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Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts

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HUMAN RIGHTS BEGIN AT HOME: A POLICY ANALYSIS OF LITIGATING INTERNATIONAL HUMAN RIGHTS IN U.S. STATE COURTS

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> *Where, after all, do universal human rights begin? In small places, close to home . . . . Unless these rights have meaning there, they have little meaning anywhere. Without concerted citizen action to uphold them close to home, we shall look in vain for progress in the larger world.*
> Eleanor Roosevelt, 1953

I. INTRODUCTION

Although there is some truth to the notion that the United States (U.S.) Constitution provides more guarantees than does international law, there are areas where it is not as protective. Consequently, instances of U.S. violations of international human rights law (IHRL) continue to arise.[1] For example, the Constitution only protects negative rights and does not guarantee basic human needs.[2] Despite the fact that the U.S. Supreme

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[1] *See infra* text Parts III and IV It is inaccurate to believe that Americans do not need the protection of IHRL. The U.S. has violated IHRL in areas as diverse as "racial and gender discrimination, prison conditions, immigrants' rights, language discrimination, the death penalty, police brutality, freedom of expression and religious freedom . . . ." HUMAN RIGHTS WATCH & AMERICAN CIVIL LIBERTIES UNION, HUMAN RIGHTS VIOLATIONS IN THE UNITED STATES: A REPORT ON U.S. COMPLIANCE WITH THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 2-3 (1993).

[2] Mark S. Kende, *The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective*, 6 CHAP. L. REV. 137, 137 (2003). Human rights are generally divided into three generations of rights. The first generation of rights are political and civil rights, and are commonly referred to as

Court (Supreme Court) has firmly held that the Constitution does not provide a right to education,[3] adequate housing,[4] or welfare benefits,[5] these are basic tenants of IHRL.[6] Moreover, any federal legislation or funding concerning social welfare (such as education or social security) is discretionary. Thus, the Government, without violating anyone's Constitutional rights, may choose to cut funds or even abandon the program entirely.[7] Yet, because state constitutions often have stronger positive and substantive rights to interpret, it is in state courts that human rights litigation can be most effective.

By comparing U.S. federal court litigation with state court litigation aimed at enforcing IHRL, this paper examines the role that state courts can and should play in the implementation of human rights in the U.S. The paper briefly comments on international institutions in Part II as a means to reinforce the reasons why, in the current atmosphere, domestic courts are the only alternative for implementing IHRL in the U.S. Part III provides the background for IHRL and its applicability and enforcement in the U.S. legal system. State court use of IHRL is examined in Part IV. Finally, Part V focuses on why state courts, as opposed to federal courts, may be the proper forum for the enforcement of human rights. They say that human

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"negative rights." The second generation of rights encompasses social and economic obligations, and are called "positive rights." Environmental, or "green" rights, form the third generation of rights. LOUIS HENKIN ET AL., HUMAN RIGHTS 475 (1999).

[3] Plyler v. Doe, 457 U.S. 202, 221 (1982) (holding that "[p]ublic education is not a 'right' granted to individuals by the Constitution."). *See also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (finding that "[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected.").

[4] Lindsay v. Normet, 405 U.S. 56, 74 (1972) (finding that "the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in [it] any constitutional guarantee of access to dwellings of a particular quality . . . .").

[5] "Welfare benefits are not a fundamental right, and neither the State nor Federal Government is under any sort of constitutional obligation to guarantee minimum levels of support." Lavine v. Milne, 424 U.S. 577, 584 n.9 (1976) (citation omitted).

[6] *See infra* text Part III and accompanying notes.

[7] *See* Helen Hershkoff, *Forward: Positive Rights and the Evolution of State Constitutions,* 33 RUTGERS L. J. 799, 823 (2002) ("Today, as poor individuals face a total cut-off in federal funds because of the federal statutory five-year cap on welfare payments under the Temporary Assistance to Needy Families Act, federal abandonment appears less unlikely.").

rights begin at home; this paper examines why human rights litigation should begin in state courts.

II. International Institutions

The United Nations (U.N.) has successfully codified a wide range of human rights, yet its lack of an effective enforcement mechanism continues to be its major weakness.[8] In addition, litigating an American's human rights before an international or regional institution is both impractical and, in many instances, impossible. The relevant bodies – the International Criminal Court (ICC), the International Court of Justice (ICJ), the Inter-American Commission on Human Rights (IACHR), the Inter-American Court of Human Rights (IACtHR), and the U.N. Human Rights Committee (HRC) – either lack an enforcement mechanism or may lack jurisdiction to hear cases where the U.S. is a party. As a result, domestic litigation is the only alternative.

A. International Criminal Court

There are some crimes of such magnitude that the international community should be involved. Moreover, the local judiciary is unlikely to be capable of dealing with certain complex crimes such as gross violations of human rights. This does not imply that trials should not be held in the country where the crimes occurred, rather that tribunals should be established under international assistance, or that an international court may take the case if justice cannot be achieved at the local level. This approach creates international precedence and also adheres to the laws regarding criminal accountability for violations of international human rights.

The ICC was created by the Rome Statute and adopted by the U.N. in 1998, coming into effect on July 1, 2002.[9] The crimes within its jurisdiction are limited to genocide, certain crimes against humanity, and certain war crimes.[10] In 2002, the U.S. "unsigned" its ratification,[11] apparently out

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[8] For much of the past 60 years, our focus has been on articulating, codifying and enshrining rights. That effort produced a remarkable framework of laws, standards and mechanisms – the Universal Declaration, the international covenants, and much else. Such work needs to continue in some areas. But the era of declaration is now giving way, as it should, to an era of implementation.

Kofi Annan, U.N. Secretary-General, Address to the U.N. Commission on Human Rights (Apr. 7, 2005), *available at* http://www.un.org/apps/sg/sgstats.asp?nid=1388.

[9] 37 I.L.M. 999 (1998).

[10] *Id.* at art. 5.

of uncertainty over whether the Court's jurisdiction "might be expanded later . . . to include acts of aggression and that U.S. nationals might be subject to the jurisdiction of the ICC."[12] Regardless, the limited subject matter jurisdiction of the ICC is not especially helpful to the broader legal strategy of applying IHRL to Americans.

B. International Court of Justice

The ICJ, also referred to as the World Court, is the principal judicial organ of the U.N.[13] A civil court situated in The Hague, the ICJ has jurisdiction only over disputes between states, meaning that the ICJ is an inappropriate venue for individual Americans to challenge U.S. law and policy.[14] Moreover, the ICJ has been perceived as "incapable . . . of resolving disputes"[15] because "throughout its 60-year history, the court has averaged only a few cases a year, and has rendered a decision in fewer than 100 all told."[16] This is in large part due to the ability of countries to restrict the court's jurisdiction over them. After 40 years of accepting the general jurisdiction[17] of the ICJ, an unfavorable ruling[18] by the court in 1986 over the

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[11] In a letter to U.N. Secretary-General, the U.S. government wrote that the U.S., in effect, "unsigned" the Rome Statute:

> This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000.

Letter from John R. Bolton, Under Secretary of State for Arms Control and International Security, to Kofi Annan, U.N. Secretary-General (May 6, 2002), *available at* http://www.state.gov/r/pa/prs/ps/2002/9968.htm.

[12] JORDAN J. PAUST, JOAN M. FITZPATRICK & JON M. VAN DYKE, INTERNATIONAL LAW AND LITIGATION IN THE U.S 42 (2000). However, U.S. nationals can be subject to the jurisdiction of the ICC even without U.S. ratification. *See* Rome Statute of the International Criminal Court art. 4, U.N. Doc. A/CONF.183/9 (1998) *reprinted in* 37 I.L.M. 999 (1998) [hereinafter Rome Statute].

[13] Statute of the International Court of Justice, art. 1 (1945), *available at* http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm.

[14] *Id.* at art. 34.

[15] Eric A. Posner, Op-Ed, *All Justice, Too, is Local*, N.Y. TIMES, Dec. 30, 2004, at A23.

[16] *Id.*

[17] General or compulsory jurisdiction occurs when a state files a declaration in which they consent to be sued by any other state that has filed a similar declaration.

[18] Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27).

U.S.' mining of Nicaraguan harbors prompted the U.S. to withdraw from the court's general (compulsory) jurisdiction.[19]

Although the U.S. still accepts the ICJ's jurisdiction under specific treaties, it is becoming increasingly hostile to negative judgments. On March 7, 2005, in response to a 2004 ICJ decision in the *Avena* case ordering new hearings for 51 Mexicans on death row in the U.S., the U.S. withdrew from the protocol of the Vienna Convention on Consular Relations (VCCR)[20] that gave the ICJ the jurisdiction to hear such a dispute between Mexico and the U.S.[21] This came after a surprising February 28, 2005 memorandum from President Bush to Attorney General Alberto Gonzales directing state courts to "give effect to the [ICJ] decision in accordance with general principles of comity."[22] The U.S.' objections in the *Avena* case revolved around the concern that it would be an abuse of the ICJ's jurisdiction for it to make "far-reaching and unsustainable findings concerning the United States criminal justice systems."[23] The ICJ refused to uphold the U.S.' objection.

The U.S. Supreme Court has avoided the question of how to enforce the *Avena* judgment against the U.S. In *Medellin v. Dretke*,[24] the Supreme Court faced the issue of what remedy, if any, should be provided to the 51 Mexican nationals who were not given their treaty right to seek help from their consulate as soon as they were arrested. Instead of deciding the merits of the case, the Supreme Court dismissed the case as "improvidently granted"[25] due in large part to President Bush's memorandum. Although the decision left open the opportunity for the Supreme Court to embrace international law and institutions, the effect may be limited because of the U.S.' withdrawal from such cases.

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[19] Adam Liptak, *U.S. Says It Has Withdrawn From World Judicial Body*, N.Y. TIMES, Mar. 10, 2005, at A16.

[20] Avena and Other Mexican Nationals (Mex. v. U.S.), 2004 I.C.J. LEXIS 11 (Mar. 31). Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter VCCR].

[21] Charles Lane, *U.S. Quits Pact Used in Capital Cases*, WASH. POST, Mar. 10, 2005, at A1.

[22] Memorandum from George W. Bush to the Attorney General (Feb. 28, 2005), *cited in* Medellin v. Dretke, 125 S. Ct. 2088, 2090 (2005).

[23] *Quoted in* Avena, 2004 I.C.J. LEXIS at *39, para. 27.

[24] 125 S. Ct. 2088 (2005).

[25] *Id.* at 2089.

C. Inter-American Commission on Human Rights and the Inter-American Court of Human Rights

In the Inter-American process cases begin at the IACHR after the victim has exhausted all local remedies. After analyzing the case (which may include hearings with both parties), the IACHR prepares a report with recommendations for the state, which then has a certain amount of time to comply. If the state does not comply, the IACHR may choose to submit the case to the IACtHR. In fact, that is the only way a case gets to the IACtHR.[26]

Thus, the IACHR, located in Washington, D.C., is a quasi-judicial body of the Organization of American States (OAS). The IACHR has the jurisdiction to hear only complaints against the U.S. that allege violations of the American Declaration on the Rights and Duties of Man (American Declaration).[27] The U.S. government has "accepted the competence and authority of the Commission"[28] to hear cases that allege violations of this Declaration. The IACtHR, on the other hand, is a purely judicial organ of the OAS and is located in Costa Rica. The IACtHR has no formal mechanism for enforcement of judgments; if a state fails to comply with a decision, the IACtHR may only inform and make recommendations to the OAS General Assembly. Because the U.S. is not bound by the American Convention on Human Rights (American Convention),[29] the only complaints

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[26] A State may, however, petition the Court directly for an advisory opinion on the interpretation of the Convention (art. 60), other treaties (art. 61) or a state's domestic laws (art. 62). *Rules of Procedure of the Inter-American Court of Human Rights*, arts. 60-62, OEA/Ser.L/V/I.4, rev. 9 (2003).

[27] Organization of American States, American Declaration on the Rights and Duties of Man, May 2, 1948, *reprinted in* Basic Documents Pertaining to Human Rights in the Inter-American System, OEA/Ser.L./V/11.71, Doc. 6, rev. 1, at 17 (1988) [hereinafter American Declaration on the Rights and Duties of Man]. *See* David Harris, *Regional Protection of Human Rights: The Inter-American Achievement, in* THE INTER-AMERICAN SYSTEM OF HUMAN RIGHTS 1 (David J. Harris & Stephen Livingstone eds., 1998).

[28] *Center for Economic and Social Rights, Petition to the Inter-American Commission on Human Rights*, at IV(A) (June 9, 2003), *available at* http://www.cesr.org/low/node/view/361. *See* Charter of the Organization of American States, art. 106 (1997); *Statute of the Inter-American Commission on Human Rights*, art. 20(a) (Oct. 1979); Coard v. U.S., Case 10.951, Inter-Am. C.H.R. 1283, OEA/ser. L/V/II.106, doc. 3 rev., ¶ 36 (1999).

[29] Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

that the IACtHR can hear are those brought under the American Declaration, which is of a more general nature than the American Convention.

Americans face tough or even insurmountable obstacles in the Inter-American system. Difficulties include the exhaustion of remedies requirement, the lack of jurisdiction over U.S. violations of the American Convention, and the fact that the IACtHR's judgments are incapable of being enforced. The only option is to petition the IACHR, but their subject matter is limited to the American Declaration and their recommendations are persuasive rather than binding. For example, in response to a report by the IACHR in 2001 that found that the U.S. violated the rights of American Indians, the U.S. said that the "government rejects the Commission's report in its entirety and does not intend to comply with the Commission's recommendations."[30] The U.S. is unashamed of its irreverence towards international bodies, an attitude that is unlikely to be modified anytime in the near future.

D. The Human Rights Committee

The HRC is the U.N. body that examines the periodic reports that states are required to submit pursuant to the provisions of the International Covenant on Civil and Political Rights (ICCPR).[31] The fact that the U.S. attached a non-self-executing clause to this treaty[32] helps explain why the HRC's report on the U.S. noted its concern with many aspects of American life, including societal discriminatory attitudes based on race and/or gender, the excessive number of offenses punishable by the death penalty and the long stay on death row, the large number of people killed or mistreated by the police, prison conditions, the election of judges, the high cost of running for political office, the rights and plights of Native Americans, and the number of minorities living below the poverty line.[33]

These international and regional judicial institutions offer little recourse to Americans who claim a violation of their human rights. Their lack of jurisdiction over the U.S., the lack of an individual complaint mechanism, and the U.S.' resistance to their judgments are hefty obstacles for Americans who wish to litigate IHRL outside the U.S. Domestic courts are,

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[30] *Quoted in* THE FORD FOUNDATION, CLOSE TO HOME: CASE STUDIES OF HUMAN RIGHTS WORK IN THE UNITED STATES 37 (2004) [hereinafter FORD FOUNDATION].

[31] International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) [hereinafter ICCPR].

[32] *See infra* text Parts III, IV.

[33] Human Rights Comm., 53rd Sess., *Comments on United States of America*, U.N. Doc. CCPR/C/79/Add 50 (1995).

in the end, more helpful to individual Americans because the international community has failed to provide effective international enforcement mechanisms. It is therefore up to the lawyers and judges of each locality to give effect to international human rights.

III. Background: International Human Rights Instruments and their Applicability in the U.S.

A. *Major Human Rights Instruments*

There are dozens of human rights treaties and instruments, a few of which are highly respected documents. The following instruments are those which have garnered enough international legitimacy that citing them in U.S. courts would not be unprecedented.

1. International Bill of Rights

This is perhaps the most famous body of IHRL. It includes the Universal Declaration of Human Rights (UDHR),[34] the ICCPR[35] and its optional protocols, and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).[36]

a. Universal Declaration of Human Rights

As a declaration adopted by the U.N. General Assembly in 1948, the UDHR[37] is the primary U.N. document codifying human rights standards and norms. The UDHR is not a legal document and therefore cannot be invoked as a source of legal obligation, although there are compelling arguments for "viewing all or part of the Declaration as legally binding, either as a matter of customary international law or as an authoritative interpretation of the UN Charter."[38] These approaches will be examined in Parts III and IV.

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[34] Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) [hereinafter UDHR].

[35] ICCPR, *supra* note 31.

[36] International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. GAOR 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966) [hereinafter ICESCR].

[37] UDHR, *supra* note 34, at 71.

[38] Henry J. Steiner & Philip Alston, International Human Rights in Context: Law, Politics, Morals 143 (2d ed. 2000) [hereinafter Steiner & Alston]. *See also* Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 Ga. J. Int'l & Comp. L. 287 (1996)

b. International Covenant on Civil and Political Rights

The ICCPR[39] declares the basic civil and political rights of individuals, such as: the right to life;[40] the right to liberty and freedom of movement;[41] the right to equality before the law;[42] the right to privacy;[43] freedom of thought, conscience, and religion;[44] freedom of opinion and expression;[45] and freedom of assembly and association.[46] Moreover, this treaty prohibits torture and inhuman or degrading treatment,[47] slavery and detention,[48] and the use of the death penalty on juveniles.[49] Although the U.S. has signed and ratified the ICCPR, the Senate attached a non-self-executing clause as well as many reservations, meaning the treaty has almost no legal consequence in the U.S.[50] The U.S. has not signed either of the Optional Protocols.[51]

c. International Covenant on Economic, Social, and Cultural Rights

Signed in 1977, the U.S. has yet to ratify the ICESCR,[52] which has 142 parties. The ICESCR establishes the basic economic, social, and cultural rights of all people. It describes such rights as: the right to self-determination; the right to wages sufficient to support a minimum standard of living; the right to equal pay for equal work; the right to form trade unions; and the right to free primary education.

(concluding that the UDHR is widely accepted in the U.S. as one of the sources of evidence of customary international law (CIL)).

[39] ICCPR, *supra* note 31.

[40] *Id.* at art. 6.

[41] *Id.* at arts. 9, 12.

[42] *Id.* at art. 14.

[43] *Id.* at art. 17.

[44] *Id.* at art. 18.

[45] ICCPR, *supra* note 31, at art. 19.

[46] *Id.* at arts. 21, 22.

[47] *Id.* at art. 7.

[48] *Id.* at art. 8.

[49] *Id.* at art. 6.

[50] The U.S. reservations are in regards to free speech (art. 20), capital punishment (art. 6), and treating juveniles as adults (art. 10).

[51] G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 59, U.N. Doc. A/6316 (Dec. 16, 1966); G.A. Res 44/128, annex, U.N. GAOR, 44th Sess., Supp. No. 49, at 207, U.N. Doc. A/44/49 (Dec. 14, 1989).

[52] G.A. Res 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (Dec. 16, 1966).

2. U.N. Charter

The U.S. became a member of the U.N. at its inception in 1945. The Charter of the U.N. (U.N. Charter)[53] provides brief references to human rights, linking human rights with human dignity without further guidance on what this requires.

3. American Declaration on the Rights and Duties of Man

Although it is not a treaty, the American Declaration,[54] adopted by the OAS and signed by the U.S in 1948, is considered to embody binding principles of customary international law (CIL).[55] All OAS member states are obliged to uphold its principles.[56] The American Declaration addresses the full range of human rights – from civil and political to economic, social, and cultural.

4. American Convention on Human Rights

The American Convention[57] is applicable on a regional level to member states of the OAS. However, the U.S. has not ratified its 1977 signing.

5. U.N. Convention on the Elimination of All Forms of Discrimination against Women

The U.S. signed the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[58] in 1988 but, despite several attempts, has not ratified it.[59] CEDAW prohibits discrimination against women (providing, for the first time in an international instrument, a definition

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53 June 26, 1945, 892 U.N.T.S. 119 [hereinafter U.N. Charter].

54 American Declaration on the Rights and Duties of Man, *supra* note 27, at 17.

55 Richard J. Wilson, *Defending a Criminal Case with International Human Rights Law*, CHAMPION 28, 30 (2000).

56 Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention of Human Rights, Advisory Opinion OC-10/89, 1989 Inter-Am.Ct.H.R. (ser. A) No. 10 (July 14, 1989).

57 Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

58 Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

59 Objections in the Senate Committee on Foreign Relations to ratification of CEDAW included the belief that "creating another set of unenforceable international standards will further dilute respect for international human rights." STEINER & ALSTON, *supra* note 38, at 207, *citing* S384-10, Exec. Rep. Sen. Comm. on For. Rel., Oct. 3, 1994. *See also* Marian Nash, U.S. Practice: Contemporary Practice of

for this form of discrimination) and requires governments to work to advance the equality of women in the fields of politics, law, employment, education, health care, commercial transactions and domestic relations.

6. U.N. Convention on the Rights of the Child

Although the U.S. signed the Convention on the Rights of the Child (CRC)[60] in 1995, it remains one of two countries (the other being Somalia) that has not ratified the CRC, the most widely adopted human rights treaty in history.[61] The CRC recognizes and establishes that children are individuals with civil, cultural, economic, social, and political rights.

7. International Convention on the Elimination of All Forms of Racial Discrimination

When the U.S. ratified the International Convention on the Elimination of All Forms of Racial Discrimination (CERD)[62] in 1994, it made many reservations regarding free speech and individual private conduct. Moreover, the U.S. Senate declared the Convention non-self-executing. CERD's definition of "racial discrimination" covers not only intentional discrimination, but also neutral laws or practices that have a discriminatory impact.[63]

8. U.N. Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment

The Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (CAT)[64] was signed by the U.S. in 1988 and ratified in 1994. At that time, the Senate included a non-self-executing declaration along with numerous reservations. The U.S. established criminal and civil liability in the federal courts for those responsible for torture in other countries.[65]

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the United States Relating to International Law, 89 Am. J. Int'l L. 96, 102-09 (1995).

60 Nov. 20, 1989, 1577 U.N.T.S. 3.

61 STEINER & ALSTON, *supra* note 38, at 511.

62 Dec. 21, 1965, 660 U.N.T.S. 195.

63 *See id.* art. 1.

64 Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter CAT].

65 *See* 18 U.S.C. §§ 2340-40B (1994) (creating the crime of acts of torture committed abroad); Torture Victims Protection Act, 28 USC § 1350 (1994), *infra* Part III(C)(2).

9. U.N. Convention on the Prevention and Punishment of the Crime of Genocide

The Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention)[66] prohibits genocidal acts "committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group."[67] The U.S. signed the Genocide Convention in 1948 and ratified it forty years later, in 1988. As required by the Convention, the U.S. outlawed genocide as a federal offense.[68]

The following two tables outline the legal authority of these international human rights instruments and provide examples of areas where IHRL offers broader protections than currently available under U.S. law.

> Unfortunately, the U.S. government passed up its first opportunity to prosecute a torturer under this new power. Ricardo Tomas Anderson, a major in Peru's Army Intelligence Service whom the U.S. State Department had identified as a torturer, was arrested upon U.S. Justice Department instructions in early March 2000, after he had flown to the United States to testify before the [IACHR]. However, under a strained and unsustainable interpretation of diplomatic immunity, Acting Secretary of State Thomas Pickering ordered his release.

Kenneth Roth, *The Charade of U.S. Ratification of International Human Rights Treaties*, 1 CHI. J. INT'L L. 347, 350 n.9 (2000) (citations omitted).

66 Dec. 9, 1948, 78 U.N.T.S. 277.

67 *Id.* at art. 2.

68 *See* Genocide Convention Implementation Act, 18 USC §§ 1091-93 (1994).

TABLE 1
INTERNATIONAL HUMAN RIGHTS INSTRUMENTS AND THEIR CURRENT APPLICABILITY IN U.S. COURTS[69]

Instrument	U.S. Action	Whether Instrument is Self-Executing or Non-Self-Executing (NSE)	Effect in U.S. Courts
UDHR	Member of the U.N.	Not a legal document	Non-binding; interpretive use only (arts. 3, 5, 7, 9, 12 and 13 are CIL)[70]
ICCPR	Signed and ratified	No (there is a NSE clause)	Non-binding; defensive and interpretive use only
ICESCR	Signed	—	Non-binding; interpretive use only
U.N. Charter	Member of the U.N.	Arguably no (there is a NSE clause)[71]	Non-binding; interpretive use only
American Declaration	Signed	Not a legal document	Binding as a source of CIL
American Convention	Signed	—	Non-binding; interpretive use only
CEDAW	Signed	—	Non-binding; interpretive use only
CRC	Signed	—	Non-binding; interpretive use only
CERD	Signed and ratified	No (there is a NSE clause)	Non-binding; defensive and interpretive use only
CAT	Signed and ratified	No (there is a NSE clause)	Non-binding; defensive and interpretive use only
Genocide Convention	Signed and ratified	Yes	Binding

[69] Portions of the UDHR, the ICCPR, and the ICESCR "may be used as part of customary law of nations or as authoritative interpretations of the United Nations Charter." Kathryn Burke et al., *Application of International Human Rights Law in State and Federal Courts*, 18 TEX. INT'L L. J. 291, 309 (1983). *See, e.g.*, Filartiga v. Pena-Irala, 630 F.2d 876, 883 (2d Cir. 1980) (referring to the UDHR and ICCPR as evidence of CIL or universal prohibitions); Mehinovic v. Vuckovic, 198 F.Supp. 2d 1322, 1345 n.24 (N.D. Ga. 2002) (citing the ICCPR for authority that torture violates obligatory norms of CIL); Estate of Cabello v. Fernandez-Larios, 157 F.Supp. 2d 1345, 1359-60 (S.D. Fla. 2001) (finding that art. 6 of the ICCPR is CIL); Sarei v. Rio Tinto Plc, 221 F.Supp. 2d 1116, 1152 (C.D. Cal. 2002) (citing the ICESCR, stating that it is "well-settled that racial discrimination is a violation of the law of nations.").

[70] United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 I.C.J. 3 (May 24) (pleadings) (where the U.S. Executive Branch recognized these as human rights guaranteed under CIL). It can also be argued that the UDHR constitutes an authoritative interpretation of the U.N. Charter.

[71] *See* Sei Fujii v. State, 38 Cal. 2d 718, 722-25 (1952) (stating, in dictum, that arts. 55 and 56 of the U.N. Charter are non-self-executing).

TABLE 2

AREAS WHERE IHRL PROVIDES BROADER PROTECTIONS THAN U.S. LAW

Discrimination and Affirmative Action	1. The UDHR, ICCPR and ICESCR require protection of rights "without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."[72] This is more extensive than many state and federal rights. 2. ICCPR Art. 26 prohibits discrimination against undocumented workers. 3. CERD Arts. 1(4) and 2(2) provide that certain affirmative action measures are not to be deemed racial discrimination and, in fact, may be required.
Criminal Justice	1. ICCPR Art. 15(1) and American Convention Art. 9 require that a criminal offender benefit from a legislated reduction in penalty that occurs after his or her crime. The same is not required by federal law.[73] 2. ICCPR Art. 7 and UDHR Art. 5 prohibit "cruel, inhuman or degrading treatment or punishment." This proscribes more conduct than the U.S. Constitution's Eighth Amendment prohibition against "cruel and unusual punishment[ ]." The "treatment or punishment" referred to in the above noted ICCPR and UDHR articles applies to non-punishment cases, whereas the Supreme Court has held that the Eighth Amendment does not apply to non-criminal penalties.[74] 3. Forcible abduction abroad for prosecution is an "arbitrary arrest" under ICCPR Art. 9, but is permitted in the U.S.[75] 4. The Second Optional Protocol to the ICCPR prohibits the death penalty.
Education	The UDHR Art. 26, ICCPR Art. 3 and CRC Art. 28 provide for the right to a free education.
Health Care	ICESCR Art.12 recognizes the right of everyone to the "highest standard of physical and mental health," requiring the state to provide, among other things, children's healthcare and a clean environment.
Welfare	ICESCR Art. 9 recognizes the right to social security.
Environment	The Rio Declaration on Environment and Development (1992)[76] recognizes the duty of states to ensure that no damage is done to the environment, and that states must conserve, protect and restore the health of the ecosystem.
Food and Housing	UDHR Art. 25 and ICESCR Art. 11 recognize the right to an adequate standard of living, including food, clothing and housing.
Children	The CRC requires the state to protect the child and to ensure the survival and development of the child, including through health care and housing.[77]

[72] ICCPR, *supra* note 31, at art. 2(1); ICESCR, *supra* note 36, at art. 2(2); UDHR, *supra* note 34, at art. 2.

[73] *See* United States v. Kirby, 176 F.2d 101, 104 (2d Cir. 1949).

[74] *See* Ingraham v. Wright, 430 U.S. 651 (1971).

[75] United States v. Alvarez-Machain, 504 U.S. 655 (1992). *See also* Celiberti de Casariego v. Uru., Communication No. R. 13/56, ¶¶ 10.1-12, U.N. GAOR, 36th Sess., Supp. No. 40, at 185, U.N. Doc. A/36/40 (Jul. 29, 1981).

[76] Rio Declaration on Environment and Development, U.N. Doc. A/CONF.151/5/ Rev.1, 31 I.L.M. 874 (1992).

[77] *But cf.* DeShaney v. Winnebago County Dep't of Soc. Services, 489 U.S. 189 (1989) (where the Supreme Court held that one cannot sue the Department of

B. International Law and International Human Rights Law as U.S. Law

International law and international agreements are the law of the U.S. and thus the supreme law of the states.[78] The Supremacy Clause of the U.S. Constitution declares that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land."[79] Moreover, Article III, Section 2 of the Constitution provides that cases arising under international law or agreements are within the jurisdiction of the federal courts.[80] Thus, a claim involving international law arises under the laws of the United States. However, although U.S. courts are obligated to give effect to these international instruments, a non-self-executing declaration by the Senate renders the instrument non-binding.[81]

Self-executing treaties are those agreements that can be easily given effect by "executive or judicial bodies, federal or State, without further legislation,"[82] unless the treaty intends the contrary. This distinction was formulated by Chief Justice Marshall in the 1828 case of *Foster v. Neilson*.[83] In *Foster*, the Court found that:

> Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as

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Social Services for failing to protect a boy who was repeatedly and severely beaten by his father because the Due Process Clause does not *require* the state to "protect life, liberty, and property of its citizens against invasion by private actors.").

[78] *See* Missouri v. Holland, 252 U.S. 416 (1920) (holding that a treaty between the U.S. and U.K. is binding on the states); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 (1987).

[79] U.S. CONST. art. VI.

[80] *Id.* at art. 3, § 2 ("The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority.").

[81] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 111 (1987) states that an

> international agreement of the United States is "non-self-executing" (a) if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation, (b) if the Senate, in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or (c) if implementing legislation is constitutionally required.

[82] *Id.* cmt. 5.

[83] 27 U.S. (2 Pet.) 253 (1829).

> equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract before it can become a rule for the court.[84]

Self-executing clauses enable individuals to challenge, in state or federal courts, violations of a treaty's rights.[85] Because the Senate has included a non-self-executing clause to almost every significant international human rights instrument, this judicially created notion of non-self-executing treaties is the biggest obstacle facing the implementation of IHRL in U.S. courts.[86] The Senate intended these clauses to prevent the instrument from creating a private cause of action in U.S. courts.[87]

Moreover, Congress is limited by international norms. The *Charming Betsy* principle requires that Congressional acts "ought never to be construed to violate the law of nations if any other possible construction remains."[88] Yet in relation to international human rights treaties, the Supreme Court has held that treaties are subject to the Bill of Rights.[89] For example, in *United States v. Steinberg*,[90] a federal district court held that the U.N. Charter was part of the supreme law of the U.S. but that it could not run counter to Constitution. Scholars have argued that according to the

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[84] *Id.* at 314.

[85] *See* OFFICE OF THE LEGAL ADVISOR, U.S. DEP'T OF STATE, PUB. NO. 8809, DIGEST OF THE UNITED STATES PRACTICE IN INTERNATIONAL LAW 65 (1974).

[86] The ICCPR, CERD, and CAT have non-self-executing clauses, whereas the Genocide Convention does not.

[87] S. EXEC. DOC. NO. 102-23, at 19 (1992), *reprinted in* 31 I.L.M. 645, 648.

[88] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). Justice Sandra Day O'Connor, Keynote Address at the Proceedings of the Ninety-Sixth Annual Meeting of the American Society of International Law (Mar. 16, 2002), *in* 96 AM. SOC'Y INT'L L. PROC., 348, 350 (2002):

> The court on which I sit has held, for more than two hundred years, that acts of Congress should be construed to be consistent with international law, absent clear expression to the contrary. Somewhat surprisingly, however, this doctrine is rarely utilized in our court's contemporary jurisprudence. I can think of only two cases during my more than twenty years on the Supreme Court that have relied upon this interpretive principle.

[89] Boos v. Barry, 485 U.S. 312, 324 (1988).

[90] 478 F. Supp. 29, 33 (N.D. Ill. 1979).

rules of treaty interpretation found in the Vienna Convention on the Law of Treaties,[91] human rights treaties to which the U.S. is a party must be given full effect in U.S. courts, despite the U.S.' reservations or non-self-executing clauses.[92] However, this argument has not swayed the courts.[93]

In addition to treaties, CIL is also considered part of U.S. law. In *The Paquete Habana* case,[94] the Supreme Court recognized that "[i]nternational law is part of our law"[95] and that "where there is no treaty, and no controlling executive or legislative act or juricial decision, resort must be had to the customs and usages of civilized nations."[96] Two issues confront a court deciding whether to apply CIL to protect individual rights: (1) "whether customary international law may be invoked by an individual in a United States court"[97] and (2) "how to establish that a particular right is protected by customary international law."[98] Once CIL is determined, however, it can be used, at the minimum, for its interpretive value, to be discussed below.

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[91] May 23, 1969, U.N. Doc. A/Conf. 39/27, *entered into force* Jan. 27, 1980, 1155 U.N.T.S. 331, 8 I.L.M. 679. Art. 19(c) provides that a nation-state "may, when signing, ratifying, accepting, approving, or acceding to [an international] treaty, formulate a reservation unless . . . the reservation is incompatible with the object and purpose of the treaty." *Id.* at art. 19(c). Despite its non-ratification, the U.S. acknowledges that the VCCR has risen to the level of CIL and is the authoritative guide to treaty interpretation. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE U.S. pt. III, introductory note (citing a Department of State letter to the President that "although not yet in force, the Convention is already generally recognized as the authoritative guide to current treaty law and practice.").

[92] *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 447-49 (2000).

[93] *See, e.g.*, Auguste v. Ridge, 395 F.3d 123, 140-43 (3rd Cir. 2005) (rejecting the argument and holding instead that where the President and the Senate express a shared consensus on the meaning of a treaty as part of the ratification process, that meaning is to govern in the domestic context.).

[94] 175 U.S. 677 (1900).

[95] *Id.* at 700.

[96] *Id.*

[97] Burke et al., *supra* note 69, at 315.

[98] *Id.*

1. Treaties as Binding Law

Attempting to litigate human rights in federal courts using treaties has had mixed results.[99] The few cases that have argued for the domestic enforcement of international human rights have been rejected by most courts.[100] For example, in *Buell v. Mitchell*,[101] the Sixth Circuit refused to hold that the imposition of the death penalty violated international agreements, stating that even if it did, the agreements would not be binding in federal courts. Moreover, in *White v. Paulsen*,[102] a Federal District Court in Washington held that no private right of action exists or should be implied under the ICCPR or the CAT due to their non-self-executing clauses. Although persuasive arguments can be made on both sides of the issue, federal courts have expressed an unwillingness to apply, as binding law, international human rights treaties if Congress has attached a non-self-executing clause.

2. Treaties as Interpretive Aids

A treaty with a non-self-executing clause may, however, be utilized for its interpretive value or to provide a rule for decision. Using treaties or international law as a tool for interpreting federal law has the benefit of maintaining judicial independence by not forcing the court to believe they are bound by international law. This process requires that lawyers urge the courts to "accept the basic normative principles of such instruments, and apply these principles in the interpretation of our own laws."[103] Persuading a court to recognize even the basic, underlying principle of IHRL, i.e. the respect for human dignity, may be all that is needed for a judge to re-examine a law in favor of a human rights-friendly interpretation. But urging a court to believe that IHRL is binding law may backfire, according to Hans A. Linde, former Justice of the Supreme Court of Oregon:

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[99] *See, e.g.*, Patricia M. Wald, *The Use of International Law in the American Adjudicative Process*, 27 HARV. J. L. & PUB. POL'Y 431 (2004).

[100] *See, e.g.*, Buell v. Mitchell, 274 F.3d 337, 370-76 (6th Cir. 2001) (refusing to hold that the imposition of the death penalty violated international agreements, and stating that even if it did, the agreements would not be binding on federal courts); White v. Paulsen, 997 F. Supp. 1380, 1386-87 (E.D. Wash. 1998) (holding that no private right of action exists or should be implied under the ICCPR or the CAT).

[101] 274 F.3d 337 (6th Cir. 2001).

[102] 997 F. Supp. 1380 (E.D. Wash. 1998).

[103] Ann I. Park, *Human Rights and Basic Needs: Using International Human Rights Norms to Inform Constitutional Interpretation*, 34 UCLA L. REV. 1195, 1249 (1987).

> To point to the international standard as a goal or an achievement to be matched may prove very successful. To point to it as an external law to be obeyed may backfire. It may backfire because, unless the legally binding nature of the international source is clear and strong, opposing counsel and the court may give more time and attention to refuting the claim that the international source has binding force than to looking at the substance of the human rights in question.[104]

Proof of the validity of Justice Linde's warning can be found in the Fifth Circuit. In 2004, after the ICJ ruled that the U.S. violated 51 Mexican nationals' rights, the Fifth Circuit Court of Appeals reviewed the case again. In a thorough analysis, it ruled that despite the ICJ's decision, the Mexican citizen before its court was procedurally barred from raising the treaty claim.[105]

The alternative of using IHRL as an interpretive tool has met with success in some federal courts. It entails the use of IHRL to "give new content and substance to constitutional guarantees,"[106] for example, by helping interpret the "'open-ended' equal protection and due process guarantees of the fourteenth and fifth amendments in order to heighten judicial scrutiny of legislation which affects those guarantees."[107] Because international law often "demands a higher standard of protection for basic needs than the American law currently provides under the fourteenth amendment,"[108] there is a definite benefit to urging a federal judge to use IHRL to interpret the Constitution. For example, in the 1989 case of *Ahmad v. Wigen*,[109] a federal district court in New York declared that international customs and treaties are not "derogatory" to our Constitution.[110] On the contrary, the court explained, "they expand and give substance to a developing enriched concept of rights of the individual that harmonizes with our Constitutional develop-

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[104] Hans A. Linde, *Comments*, 18 INT'L LAW 77, 78 (1984).

[105] Medellin v. Dretke, 371 F.3d 270 (5th Cir. 2004).

[106] Park, *supra* note 103, at 1243, *citing* Gordon Christenson, *Using Human Rights Law to Inform Due Process and Equal Protection Analyses,* 52 U. CIN. L. REV. 3 (1983).

[107] *Id.* at 1243-44.

[108] *Id.* at 1248.

[109] *In re* Mahmoud El Abed Ahmad v. Wigen, 726 F. Supp. 389 (E.D.N.Y. 1989).

[110] *Id.* at 411.

ments."[111] This line of legal reasoning helps provide the legal framework in which human rights law can be implemented.

International law can also be used to help interpret vague Constitutional provisions. For example, in *Lareau v. Manson*,[112] the Federal District Court in Connecticut looked to international standards to give a fuller meaning of the Eighth Amendment in terms of the treatment of prisoners, resulting in an expansion of protections for prisoners. In doing so, the litigants never argued that the treaties should be considered as binding law. Moreover, in *Fernandez v. Wilkinson*,[113] the Federal District Court in Kansas cited the UDHR as an example of CIL. The UDHR helped the court conclude that CIL was violated when the U.S. held a Cuban refugee – who was determined not to be a security risk – in indeterminate detention.

International norms may help interpret more than criminal law. In *Doe v. Plyler*,[114] a Federal District Court in Texas cited Article 47 of the Protocol of Buenos Aires[115] (an amendment to the OAS Charter that the U.S. ratified in 1970) as an indication of the U.S.' "commitment to expanding educational opportunity."[116] Citing to the Protocol of Buenos Aires for support, the court held that a Texas statute that permitted only U.S. citizens or lawfully admitted aliens to attend public schools for free violated the equal protection clause of the Fourteenth Amendment.[117]

In addition to these federal court decisions, an increasing portion of Supreme Court cases utilize IHRL as an interpretive tool. The opportunity is not new. In 1949, for example, the Supreme Court referred to the UDHR in upholding an amendment in Arizona's constitution that prohibited closed-shop union arrangements.[118] Justice Frankfurter's concurring opinion cited Article 20(2), which states that "[n]o one may be compelled to belong to an association."[119] The more recent trend can be traced to the

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[111] *Id.*

[112] 507 F. Supp. 1177 (D. Conn. 1980), *modified on other grounds*, 651 F.2d 96 (2d Cir. 1981).

[113] 505 F. Supp. 787 (D. Kan. 1980), *aff'd sub nom. on other grounds*, Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382 (10th Cir. 1981).

[114] 458 F. Supp 569 (E.D. Tex. 1978), *aff'd* 628 F.2d 448 (5th Cir. 1980), *aff'd* 457 U.S. 202 (1982).

[115] Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, 6 I.L.M. 310.

[116] 458 F. Supp 569, 592 (E.D. Tex. 1978).

[117] *Id.* at 592-93.

[118] Am. Fed'n of Labor v. Am. Sash & Door Co., 335 U.S. 538 (1949).

[119] *Id.* at 549 n.5 (Frankfurter, J., concurring).

developments concerning the use of the death penalty.[120] In 1987, in the case of *Thompson v. Oklahoma*,[121] the Supreme Court held that the Eighth Amendment's prohibition against cruel and unusual punishment was violated by the execution of a sixteen year-old convicted murderer. In its judgment, the court used the ICCPR for its interpretive value, despite the fact that at that time the U.S. had not signed or ratified the treaty. Later, in 2002, the Supreme Court looked to the world community to help it decide that it was unconstitutional to apply the death penalty to mentally challenged criminals. In that case, *Atkins v. Virginia,* the court stated that "within the world community, the imposition of the death penalty for crimes committed by mentally [challenged] offenders is overwhelmingly disapproved."[122] *Atkins* illustrates how, depending on the case and the judicial receptivity, litigating IHRL may be an effective strategy.

In 2005, only three years after *Atkins*, the court was faced with another death penalty case. In *Roper v. Simmons*,[123] the court had to decide the constitutionality of the execution of a juvenile who was under eighteen years of age when he committed the crime. To help confirm their conclusion, the court cited to international treaties such as the CRC and the ICCPR as well as international opinion, which disapproves of the juvenile death penalty.[124] In looking outside of American law, the court explained this was actually the American thing to do: "It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom."[125] Justice Scalia's dissent unsurprisingly criticized the court for its reliance on international law, stating that "'[a]cknowledgement' of foreign approval has no place in the legal opinion of this Court *unless it is part of the basis for the Court's judgment*, which is

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[120] Yet the cases are not limited to those concerning the death penalty. For example, "[t]wo of the court's landmark decisions, upholding the University of Michigan Law School's affirmative action program and overturning a Texas anti-sodomy statute, both cited human rights." FORD FOUNDATION, *supra* note 30, at 39.

[121] 487 U.S. 815 (1988).

[122] 536 U.S. 304, 347 n.21 (2002).

[123] 125 S. Ct. 1183 (2005).

[124] "The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions." *Id.* at 1200.

[125] *Id.*

surely what it parades as today."[126] Views like Scalia's are not uncommon and continue to be an obstacle for lawyers advocating IHRL.

In order to have an impact on the lives of ordinary Americans, however, the more substantive law to interpret exists at the state level. Therefore, because there are more positive rights in state laws and constitutions than in federal statutes and the U.S. Constitution, IHRL advocacy at the state level would have a broader effect.

3. Treaties as a Defense

Using IHRL as an interpretive tool is not the only option. Litigants may use a treaty as a defense, a route usually taken in a criminal prosecution. The defensive use of a treaty is not only permissible but advisable when a defendant is facing, for example, an unfair trial or the unfair imposition of the death penalty.[127] For instance, in *United States v. Benitez*,[128] the district court accepted the defendant's use of the ICCPR as part of his defense, although the court ultimately rejected the defense based on the particular facts of the case.[129]

C. Federal Statutory Jurisdiction

1. Alien Tort Claims Act

The Alien Tort Claims Act (ATCA)[130] grants original jurisdiction to federal district courts for "any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."[131] The unanimous decision in *Filartiga v. Pena-Irala*,[132] sparked a new light in human rights litigation by using this 1789 statute to sue foreign human rights abusers in federal court. In the case, the Filartigas – a Paraguayan doctor and his daughter – brought an ATCA claim against Pena-Irala, another Paraguayan in a New York District Court for "wrongfully causing the

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[126] *Id.* at 1229 (emphasis in original). *See also* Thompson v. Oklahoma, 487 U.S. 815, 869 n.4 (1998) (Scalia, J., dissenting) ("[W]here there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans.").

[127] Wilson, *supra* note 55.

[128] 28 F. Supp. 2d 1361, 1363 (S.D. Fla. 1998).

[129] *Id.*

[130] 28 U.S.C.A. § 1350 (1982).

[131] *Id.*

[132] 630 F.2d 876 (2d Cir. 1980).

death of Dr. Filartiga's seventeen-year old son, Joelito."[133] The Filartigas alleged that in 1976 Pena-Irala, who at that time was Inspector General of Police in Asuncion, Paraguay, had kidnapped Joelito and tortured him to death. The Second Circuit held that conduct, such as "an act of torture committed by a state official against one held in detention"[134] violates the law of nations and international human rights law.[135]

The viability of ATCA suits was reaffirmed in 2004 by the Supreme Court's decision in *Sosa v. Alvarez-Machain.*[136] The *Sosa* Court upheld *Filartiga* and subsequent ATCA cases that have claimed violations of "specific, universal and obligatory" norms.[137] Despite the Supreme Court's stamp of approval, however, there exist various statutory and practical hurdles in bringing an ATCA claim. For one, victims must demonstrate that "the abuses fit within a fairly narrow set of the most horrendous forms of human rights violations."[138] Secondly, the ATCA only provides aliens, as opposed to U.S. citizens, the right to sue their perpetrators. Thirdly, the federal laws of personal jurisdiction require that the perpetrator reside in the U.S., have significant contacts, or is served with the lawsuit while they are present in the U.S. Moreover, not only are ATCA cases expensive to pursue, there is no guarantee that the victim will receive any damages.[139] All of these hurdles help explain why there have only been a relatively small number of cases actually litigated, less than one hundred since the 1980 landmark decision in *Filartiga.*[140] Of these cases, only 19 parties have successfully sued for damages.[141]

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[133] *Id.* at 878.

[134] *Id.* at 880.

[135] *Id.*

[136] 542 U.S. 692 (2004).

[137] *Id.* at 748.

[138] HUMAN RIGHTS FIRST, THE ALIEN TORT CLAIMS ACT: PROMOTING ACCOUNTABILITY AND LIMITING IMPUNITY FOR SERIOUS HUMAN RIGHTS VIOLATIONS (Mar. 2004), *available at* http://www.humanrightsfirst.com [hereinafter PROMOTING ACCOUNTABILITY].

[139] "Plaintiffs and attorneys have had a difficult time enforcing these judgments in the past, either because (a) the defendant does not have assets, or (b) the defendant has assets but has hidden them in another country." CENTER FOR JUSTICE AND ACCOUNTABILITY, INFORMATION CJA NEEDS TO FILE A LAWSUIT AGAINST HUMAN RIGHTS ABUSERS WHO LIVE IN OR VISIT THE UNITED STATES, *available at* http://www.cja.org.

[140] PROMOTING ACCOUNTABILITY, *supra* note 138.

[141] *Id.*

The types of norms the courts have accepted and denied reflect the parameters of what are considered universal norms. The right not to be tortured or subjected to arbitrary imprisonment "are more readily accepted as fundamental human rights than are the rights to subsistence benefits, shelter, health care, or education."[142] For example, federal courts have held that the following violations may serve as a basis for a claim under ATCA: summary execution and killing;[143] torture;[144] arbitrary, prolonged detention, disappearance and kidnapping;[145] war crimes; genocide;[146] slavery and/or forced labor;[147] crimes against humanity;[148] systematic racial discrimination;[149] and the denial of political rights.[150] By contrast, courts have held that the following conduct does not violate the law of nations and thus are not actionable under ATCA: cultural genocide and environmental abuses;[151] cruel and inhuman treatment and the failure of sustainable development;[152] child custody disputes; terrorism; libel and free speech;[153] negligence;[154] and fraud.[155]

2. Torture Victim Protection Act of 1991

The Torture Victim Protection Act (TVPA)[156] of 1991 was signed into law by President Bush in 1992 and extended the ATCA by providing similar rights to both U.S. citizens and non-citizens. It allows individuals to sue their perpetrators for acts of torture[157] or extrajudicial killing[158] suffered

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142 Park, *supra* note 103, at 1242.

143 Kadic v. Karadzic, 70 F.3d 232 (2d Cir. 1995).

144 Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

145 Hilao v. Estate of Marcos, 25 F.3d 1467 (9th Cir. 1994).

146 Sarei v. Rio Tinto PLC., 221 F. Supp. 2d 1116 (C.D. Cal. 2002).

147 Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002).

148 Doe I v. Islamic Salvation Front, 993 F. Supp. 3 (D.D.C. 1998).

149 Kadic, 70 F.3d 232.

150 Tachiona v. Mugabe, 234 F. Supp. 2d 401 (S.D.N.Y. 2002).

151 Beanal v. Freeport-McMoran, Inc., 197 F.3d 161 (5th Cir. 1999).

152 Sarei v. Rio Tinto PLC., 221 F. Supp 2d 1116 (C.D. Cal. 2002).

153 Guinto v. Marcos, 654 F. Supp. 276 (S.D. Cal. 1986).

154 Lopes v. Reederei Richard Schroder, 225 F. Supp. 292 (E.D. Pa. 1963).

155 Abiodun v. Martin Oil Serv., Inc., 475 F.2d 142 (7th Cir. 1973).

156 Pub. L. No. 102-256, 106 Stat. 73 (1992) (*codified at* 28 U.S.C. § 1350 (1994)).

157 ([A]ny act by which severe pain or suffering . . whether physical or mental, is intentionally inflicted on [an] individual . when such pain or suffering is inflicted by, or at the instigation of, or with the consent or acquiescence of, a public official or other person acting in an official capacity.).

in another country by officials acting under the "color of law" of a foreign sovereign. The ATCA and the TVPA are two exceptional statutes that enable victims to hold their perpetrators accountable for their horrendous acts. One negative aspect of both statutes is that many valid human rights abuses will not be adequate for such litigation because of the difficulty of personal jurisdiction requirements of the federal courts, even if the abuser occasionally visits the U.S. "it may be impossible to determine their itinerary with enough time to prepare and file a lawsuit."[159] When this can be ascertained, however, both statutes exemplify what may well be the only federal statutory jurisdiction for litigating human rights violations in federal courts.

3. The Antiterrorism Act of 1990 and the Foreign Sovereign Immunities Act

The Antiterrorism Act of 1990[160] provides the right for any U.S. national to sue in federal district court for damages resulting from an act of international terrorism.[161] However, the Act forbids suits against government officials acting in their official capacity. Along the same lines, the 1996 Amendment to the Foreign Sovereign Immunities Act (FSIA)[162] allows for civil suits for "torture, extrajudicial killing, and other abuses against a small group of foreign governments."[163] It allows U.S. citizens to sue "but only when the defendant government is on the U.S. government's list of foreign states designated as 'state sponsors of terrorism.'"[164] With this limitation, these statutes provide a very limited number of Americans the ability to sue in federal courts using IHRL.

The ATCA, TVPA, the Antiterrorism Act of 1990, and the 1996 amendment to FSIA are the only statutorily granted causes of action available to individuals wanting to sue perpetrators of human rights abuses in U.S. federal courts. Nevertheless, human rights scholars and lawyers con-

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Id.

[158] Extrajudicial killing is considered to be any murder or execution by a person acting in an official capacity without legal authority.

[159] BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 225 (1996).

[160] 18 U.S.C §§ 2331-38 (2005).

[161] *Id.* §§ 2333-38.

[162] 28 U.S.C. § 1605(a)(7) (2005).

[163] Beth Stephens, *Translating Filartiga: A Comparative and International Law Analysis of Domestic Remedies for International Human Rights Violations,* 27 YALE. J. INT'L L. 1, 9-10 (2002) (citation omitted).

[164] *Id.*

stantly propose new avenues.[165] These statutorily created civil remedies are a necessity, particularly when the U.S. government refuses to criminally prosecute human rights abusers that travel or reside in the U.S.[166] As admirable as the federal statutes are, their reach is only to aliens or Americans who were affected abroad. Similarly, their breadth is only to the most horrible human rights abuses. Additional human right norms – such as economic, social, and cultural rights – are not subject matters capable of litigation through these statutes. At the end of the day, there are no federal statutes that allow U.S. citizens to benefit from the protections afforded by IHRL, unless their human rights were violated outside of the U.S.

IV. State Court use of International Law and IHRL

Human rights attorneys look to international norms because they often surpass U.S. and state constitutional rights. Because these domestic protections define "minimum standards,"[167] international instruments "may be invoked only in so far as they equal or surpass domestic standards."[168] In order to invoke these norms in state courts, one must know how international law applies to the states. The U.S. Constitution and the laws of the

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[165] One example is using the Civil Rights Act, 42 U.S.C. § 1983, to incorporate international human rights norms. *See* Martin A. Geer, *Human Rights in Our Own Backyard: Incorporating International Human Rights Protections Under Domestic Civil Rights Law – A Case Study of Women in United States Prisons*, 13 Harv. Hum. Rts. J. 71 (2000).

[166] Beth Van Schaack, *In Defense of Civil Redress: The Domestic Enforcement of Human Rights Norms in the Context of the Proposed Hague Judgments Convention*, 42 Harv. Int'l L. J. 141, 148-49 (2001).

> (In contrast to some other common law jurisdictions, there are no significant criminal cases for torture and crimes against humanity in the United States despite the legality of such prosecutions. Pursuant to [CAT], the United States enacted a statute authorizing the exercise of universal jurisdiction by U.S. courts over torture committed extraterritorially. The statute grants jurisdiction where the alleged offender is a national of the United States or where the alleged offender is present in the United States, regardless of the nationality of either victim or offender. However, despite receiving credible information about the presence of human rights abusers within the United States, this statute has yet to be utilized.).

[167] Paul Hoffman, *The Application of International Human Rights Law in State Courts: A View from California*, 18 Int'l Law 61, 65 (1984).

[168] *Id.*

nation are the supreme laws to which the states are bound. Each time the Senate has given its advice and consent to ratify a major human rights treaty, it has done so with an understanding that different levels of governments (federal, state, local) may be responsible for fulfilling the mandates of the instrument. For example, the U.S. declared the following when it signed the ICCPR:

> That the United States understands that this Covenant shall be implemented by the Federal Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered therein, and otherwise by the state and local governments; to the extent that state and local governments exercise jurisdiction over such matters, the Federal Government shall take measures appropriate to the Federal system to the end that the competent authorities of the state or local governments may take appropriate measures for the fulfillment of the Covenant.[169]

However, neither federal nor state governments give enough effect to IHRL, despite the U.S.' stated understanding that they must/may. The Human Rights Committee, the U.N. body that oversees the implementation of the ICCPR, found that the report prepared by the U.S. to the HRC contained "comprehensive information on the laws and regulations giving effect to the rights provided in the Covenant at the federal level,"[170] yet it "contained few references to the implementation of Covenant rights at the state level."[171] As discussed above, treaties have not been implemented at the federal level, for Congress has consistently refused to do so when ratifying the treaties. Because of this failure on the part of the legislative branch, implementation relies on the judicial leadership at state and federal levels.

This Part will discuss how state courts have treated the three different ways in which human rights treaties can be used in courts: (a) actual application of the treaty; (b) defensive use; and (c) as an interpretive aid.

A. State Court Decisions Denying the Applicability of IHRL

The seminal case for the principle that human rights instruments are non-self-executing, and hence cannot be directly applied, stems from a dicta

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[169] U.S. RESERVATIONS, DECLARATIONS, AND UNDERSTANDINGS, ICCPR, 138 CONG. REC. S4781, S4784 (daily ed. Apr. 2, 1992).

[170] Comments on United States of America, Human Rights Comm., 53rd Sess., U.N. Doc. CCPR/C/79/Add 50 (1995), *available at* http://www1.umn.edu/humanrts/hrcommittee/US-ADD1.htm.

[171] *Id.*

statement made by the California Supreme Court in the 1952 case of *Sei Fujii v. California.*[172] In *Sei Fujii*, the court rejected the appellate court's finding that the California Alien Land Law violated the non-discrimination provisions of Articles 1, 55, and 56 of the U.N. Charter. The court stated, in dictum, that the human rights articles of the U.N. Charter were non-self-executing because they "lack the mandatory quality and definiteness which would indicate an intent to create justiciable rights in private persons immediately upon ratification."[173] Other state courts have followed *Sei Fujii*'s example in denying the binding force of the U.N. Charter.

Lawyers in death penalty cases often cite to international standards, with little avail. Both the California Court of Appeals, in *People v. Barnes*,[174] and the Alabama Court of Criminal Appeals, in *Wynn v. State*,[175] rejected the provision in the CRC that banned life imprisonment or the execution of minors. In addition, in *Domingues v. Nevada*,[176] the Nevada Supreme Court held that "the Senate's express reservation of the [U.S.] right to impose a penalty of death on juvenile offenders negates Domingues' claim that he was illegally sentenced" in violation of Article 6(5) of the ICCPR, which bars the execution of juveniles under age 18.[177] However, a dissenting justice in *Domingues* was concerned that the Senate's reservation was invalid, because "Article 4(2) of the treaty states that there shall be no derogation from Article 6 which includes the prohibition on the execution of juvenile offenders."[178] Although the case exemplifies how many state judges are reluctant to give effect to the purpose and meaning of international human rights treaties, the dissent may indicate the possibility for courts to analyze the legality of the Senate's reservations to a treaty.

This last case shows that litigation "might better focus on the use of treaty provisions to which no reservation has been taken."[179] Moreover, these cases can be distinguished from the cases that do use IHRL because the U.S. had made a reservation in the ICCPR that specifically indicates its intent to use the death penalty on juveniles. On the other hand, as discussed earlier, the Supreme Court has disregarded this reservation and held, in

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[172] 242 P.2d 617 (1952).

[173] *Id.* at 622.

[174] 2002 WL 53230, at *7 (Cal. Ct. App. Feb. 13, 2002).

[175] 804 So.2d 1122, 1145 (Ala. Crim. App. 2000).

[176] 961 P.2d 1279 (1998).

[177] *Id.*

[178] *Id.* at 1280 (Rose, J., dissenting).

[179] Wilson, *supra* note 55, at 56. *See also* William Schabas, *Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?*, 21 BROOKLYN J. INT'L L. 277 (1995).

Roper v. Simmons,[180] that the juvenile death penalty is unconstitutional, thereby reversing the above-mentioned state cases.[181]

B. State Court Decisions Accepting the Applicability of IHRL

In 2003, the Supreme Court declined to hear the case of a Mexican national, Osbaldo Torres, whose VCCR right to assistance from the Mexican consulate was violated by the U.S.[182] Yet, in 2004, the ICJ upheld Torres' claims.[183] On May, 13, 2004, the Oklahoma Court of Criminal Appeals was prompted by the ICJ decision to halt Torres' execution, thereby treating a U.S. treaty as binding law.[184] The same day, Oklahoma Governor Brad Henry commuted Torres' sentence, making reference to the ICJ's ruling.[185]

In *Sterling v. Cupp*,[186] the Oregon Supreme Court relied on almost half a dozen human rights instruments to interpret a state constitutional provision regarding the treatment of prisoners.[187] The court held that the state constitution was violated by a law that allowed female prison officers to supervise male prison inmates. In reaching its conclusion, the court cited the U.N. Charter, the UDHR, the ICCPR, the American Convention, and the Standard Minimum Rules for the Treatment of Prisoners, approved by the U.N. Economic and Social Council.[188]

In *Boehm v. Superior Court*,[189] the California Court of Appeals relied on Article 25 of the UDHR to interpret a state statutory duty to support the poor.[190] The court held that a reduction in general assistance benefits

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[180] 125 S. Ct. 1183.

[181] *Id.* at 1194 ("The reservation to Article 6(5) of the ICCPR provides minimal evidence that there is not now a national consensus against juvenile executions.").

[182] Torres v. Oklahoma, 525 U.S. 1082, 119 S. Ct. 826.

[183] Avena and Other Mexican Nationals (Mexico v. U.S.), 2004 I.C.J. LEXIS 11 (Mar. 31).

[184] Torres v. State, 2004 WL 3711623 (Okla. Crim. App. May 13, 2004). .

[185] Tony Mauro, *The World According to the Supreme Court*, LEGAL TIMES, Nov. 22, 2004, *available at* http://www.law.com/jsp/article.jsp?id=1100535371397.

[186] 625 P.2d 123 (Or. 1981) (en banc).

[187] *Id.*

[188] *Id.* at 132.

[189] 223 Cal. Rptr. 716 (Cal. Ct. App. 1986).

[190] UDHR, *supra* note 34, at art. 25(1) provides that:

> Everyone has the right to a standard of living adequate for the health and well being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment,

was "arbitrar[y] and capricious[ ]" where the county fixed its grant "without considering the recipients' need for a clothing, transportation and medical care allowance."[191] The court used the UDHR for help articulating that "common sense and all notions of human dignity" would require a minimum level of subsistence.[192]

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sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

[191] Boehm, 223 Cal. Rptr. at 722.

[192] *Id.* at 721.

TABLE 3
A SAMPLE OF STATE COURT CASES THAT USED IHRL TO GIVE CONTEXTUAL SUPPORT TO THEIR HOLDINGS

Right to Privacy	In *City of Santa Barbara v. Adamson*,[193] the California Supreme Court cited language from the UDHR in discussion of California's constitutional amendment recognizing a right to privacy in one's family as well as in one's home.
Right to Freedom from Discrimination	In *American Nat'l Ins. Co. v. Fair Employment and Housing Comm'n*,[194] the California Supreme Court noted the relevance of the UDHR to a discrimination claim based on disability.
Right to Freedom of Movement	The California Appellate Court, in *In Re White*,[195] cited to the UDHR provision on freedom of movement within a state in striking down a term of probation prohibiting a former prostitute from entering certain neighborhoods.
Right to Education	The West Virginia Supreme Court, in *Pauley v. Kelly*,[196] cited the UDHR for the proposition that education is a fundamental right.
Criminal Justice	*Commonwealth v. Edward Sadler*[197] cited the UDHR to support the holding that the state had an obligation to educate juveniles in custody.
Right to Basic Human Needs	In *Boehm v. Superior Court*,[198] the California Court of Appeals cited the UDHR to support its finding that it was inhumane for California to exempt allowances for clothing, transportation or medical care from its calculation of payment rates for general relief.
Parental Rights	In an action to terminate parental rights, the New Hampshire Supreme Court, in *New Hampshire v. Robert H.*,[199] cited the ICCPR and ICESCR to stand for the proposition that parental rights are natural and inherent under the state's constitution.
Children's Rights	An Ohio court, in *In re Julie Anne*,[200] restrained the parents of a minor child from smoking, or allowing anyone else to smoke, anywhere in the presence of the child. The court supported its decision by the CRC's "obligation to ensure children's right to the highest attainable standard of health,"[201] and found that "involuntary harmful exposure of children to secondhand smoke can be seen as a human rights violation."[202] In *Batista v. Batista*,[203] the Connecticut Superior Court found it embarrassing that the U.S. had not signed the CRC, and held, in accordance with the CRC, that the child's wishes should be taken into consideration in a custody proceeding.

[193] 610 P.2d 436, 439 n.2 (Cal. 1980); *see also* Humphers v. First Interstate Bank, 696 P.2d 527, 531 n.7 (Or. 1985) (en banc).
[194] 651 P.2d 1151, 1154 n.4 (Cal. 1982).
[195] 158 Cal. Rptr. 562, 567 n.4 (Cal. Ct. App. 1979); *see also* Eggert v. City of Seattle, 505 P.2d 801, 802 (Wash. 1973) (en banc).
[196] 255 S.E.2d 859, 864, n.5 (W. Va. 1979); *see also* Sheridan Rd. Baptist Church v. Dep't of Educ., 396 N.W.2d 373, 408 n.30 (Mich. 1986).
[197] 3 Phila. Co. Rptr. 316, 330 (Pa. Com. Pl. 1979).
[198] 223 Cal. Rptr. 716, 721 (Cal. Ct. App. 1986).
[199] 393 A.2d 1387, 1390 (N.H. 1978).
[200] 780 N.E.2d 635 (Ohio Ct. Com. Pl. 2002).
[201] *Id.* at 652.
[202] *Id.*
[203] 6 Conn. L. Rptr. 512, 1992 WL 156171 (Conn. Super. Ct. 1992).

DISSENTING/CONCURRING OPINIONS

Right to be Protected from Cruel and Unusual Punishment	Justice Newman's dissenting opinion in *Cramer v. Tyars*[204] cited the UDHR to support his conclusion that the questioning of a mentally challenged person by the prosecution in a hearing regarding his committal was "cruel and degrading."[205]
Right to Welfare	In his concurring opinion in *Moore v. Ganim*,[206] Chief Justice Peters cited the UDHR to support his conclusion that Connecticut's Constitution included a right to welfare.

V. ANALYSIS

As described above, litigating IHRL in federal courts has had mixed results. Gross violations of human rights, usually committed abroad or affecting aliens – such as torture and extrajudicial killings – have their proper place in federal courts because of the protected jurisdiction found in statutory causes of action. In addition, even if a federal court refuses to directly enforce a non-self-executing treaty, it often uses IHRL as an interpretive tool. However, the range of rights to interpret is narrow; stronger positive rights to interpret exist at the state level. In light of these limitations, positive rights-based claims can be most effectively argued and promoted in state courts. This Part will analyze the doctrinal and normative arguments for and against using state courts to enforce IHRL.

A. Doctrinal Arguments

1. Human Rights Abuses Occurring in the State are Treated as State Constitutional Violations

Many state constitutions go beyond the floor of rights required by the federal Constitution. Moreover, some international human rights norms are broader than what the Constitution provides.[207] In its first report to the HRC regarding its compliance with the ICCPR, the U.S. declared that the federal government was

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[204] 558 P.2d 793 (Cal. 1979) (Newman, J., dissenting).
[205] *Id.* at 799.
[206] 660 A.2d 742, 781 (Conn. 1995) (Peters, C.J., concurring):

> ([a]lthough the [U.S.] is not a party to the International Covenant, and although no right to subsistence may yet apply to this country as part of customary international law, the wide international agreement on at least the hortatory goals identified in the human rights documents strongly supports the plaintiffs' claim.).

(citation omitted).
[207] Hoffman, *supra* note 167; *see also* TABLE 2: AREAS WHERE IHRL PROVIDES BROADER PROTECTIONS THAN U.S. LAW, *supra* text Part III(A).

> a government of limited authority and responsibility . . . [and that] state and local governments exercise significant responsibilities in many areas, including matters such as education, public health, business organization, work conditions, marriage and divorce, the care of children and the exercise of the ordinary police power . . . . Some areas covered by the [ICCPR] fall into this category.[208]

State governments, in contrast to the federal government, can and do provide their citizens' basic needs in ways that the federal government cannot. As a result, one can challenge a human rights violation in state court, alleging a violation of a state, as opposed to federal, constitutional or statutory provision. Furthermore, in contrast to the federal courts, "state courts have been more progressive in providing for protection for basic needs"[209] because state courts may supplement the federal constitutional minimum standards "through interpretation of their own constitutional or statutory standards."[210] These constitutions and statutes are exactly where IHRL can be utilized for their interpretive value.

States have begun to realize that their state constitutions are often more protective of civil liberties and positive rights than the Supreme Court has interpreted the U.S. Constitution to be. Consequently, "many state supreme courts have become receptive forums for civil liberties arguments that the U.S. Supreme Court has rejected."[211] For example, in 1991, a Michigan appellate court struck down a voter-approved ban on state-funded abortions for poor women.[212] The court held that the ban violated the state's equal protection clause by discriminating against women who exercise their fundamental right to have an abortion. The court was able to base their holding on the fact that the case concerned provisions of Michigan's Constitution, which they "are free to read more broadly and analyze differently than those of the federal constitution."[213] Although the Michigan Supreme Court later reversed this decision, the appellate decision reflects how

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[208] *Initial Reports of State Parties Due in 1993*, CCPR/C/81/Add.4 (Aug. 24, 1994) (submitted by the U.S.).

[209] Park, *supra* note 103, at 1255.

[210] *Id.*

[211] Milo Geyelin & Ellen Joan Pollack, *Pennsylvania High Court Tightens Rules on Police Seizure of Evidence*, WALL ST. J., Feb. 7, 1991, at B4.

[212] Doe v. Dir. of Dep't of Soc. Serv., 468 N.W.2d 862 (Mich. Ct. App. 1991).

[213] *Id.* at 875.

state constitutional rights may be interpreted to be broader than those in the U.S. Constitution.[214]

State courts have recognized a right to education that the U.S. Supreme Court has said does not exist in the U.S. Constitution. For example, the West Virginia court in *Pauley v. Kelly*[215] held that education is a fundamental right. To support its holding, the court cited to the UDHR, which they noted "appears to proclaim education to be a fundamental right of everyone, at least on this planet."[216] Sixteen years later, in February 2005, the state of New York found the right to education in their constitution. Justice Leland DeGrasse of the State Supreme Court in Manhattan ruled that "an additional $5.6 billion must be spent on the city's public schoolchildren every year to ensure them the opportunity for a sound basic education that they are guaranteed under the State Constitution."[217] Perhaps the more significant part of the ruling is that Justice DeGrasse "ordered a specific amount of money to be spent on the city's schools,"[218] reflecting one way a court can decide how to properly enforce positive rights.[219]

2. Human Rights Abuses Committed Abroad by a State Citizen or Corporation

Globalization and the influx of corporations doing business in other countries suggests the need for the "creative use of the law to hold multinational corporations accountable"[220] for their human rights abuses. In fact, this avenue of litigation "may be as important as holding individual perpetrators and governments accountable for their actions."[221] State courts may hear a case where a state citizen or corporation is sued for human rights violations committed abroad. This entails the extraterritorial application of the state's tort laws. For example, a state corporation that sells products

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[214] Doe v. Dep't of Soc. Services, 487 N.W.2d 166 (Mich. 1992).

[215] 255 S.E. 2d 859 (W. Va. 1979).

[216] *Id.* at 865 n.5.

[217] Greg Winter, *Judge Orders Billions in Aid to City Schools*, N.Y. TIMES, Feb. 15, 2005, at A1.

[218] *Id.*

[219] *Id.* ("With that step, the courts have moved into a realm that is usually the closely defended prerogative of lawmakers.").

[220] STEPHENS & RATNER, *supra* note 159, at 230.

[221] *Id.*

abroad with the knowledge that they will be used to harm third parties may be held liable under domestic tort laws.[222]

This type of litigation can also be referred to as "transitory torts." In this type of case, a plaintiff would file in state court a tort that parallels the sorts of international human rights protected under ATCA or the TVPA. This doctrine provides that

> civil actions for personal injury torts are transitory in that the tortfeasor's wrongful acts create an obligation which follows him across national boundaries. If personal jurisdiction is obtained over the defendant, if his acts violate the law of the situs state, and if the polices of the forum state are consistent with the foreign law, then the exercise of jurisdiction is proper.[223]

Thus, the state may have subject matter jurisdiction over torts that were committed in another country, and would merely need to have personal jurisdiction over the defendant to be able to hear the case.

The April 2005 settlement of a federal and a state case might in fact be the leading cases in this development. The state case of *Doe v. Unocal*[224] mirrored the federal case of the same name[225] and brought an ATCA claim against Unocal. However, the state case pled the case according to state law and alleged no violations of IHRL. In the case, Burmese victims sued Unocal for their complicity in using slave labor to make a pipeline in Burma. The victims claimed that Unocal violated a California business and professional code whereby a corporation may be held liable for the unlawful results of its business practices. The plaintiffs also included claims of wrongful death, battery, false imprisonment, assault, intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, and the violation of California Constitution Article 1, § 6 prohibiting slav-

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[222] *See* Zeinah v. Fed. Lab., Inc., Civ. No. 91-2148 (W.D. Pa. Sept. 25, 1992) (holding that the complaint alleging negligent sale of tear gas states a claim for relief).

[223] Jeffery M. Blum & Ralph G. Steinhardt, *Federal Jurisdiction over International Human Rights Claims: The Alien Tort Claims Act after Filartiga v. Pena-Rala,* 22 HARV. INT'L L. J. 53, 63 (1981), *citing* Slater v. Mex. Nat'l Ry. Co., 194 U.S. 120 (1904); McKenna v. Fisk, 42 U.S. 241, 248-49 (1843); Filartiga, 630 F.2d at 885.

[224] Doe v. Unocal Corp., Case Nos. BC 237980 & BC 237679 (Cal. Sup. Ct. 2004) (the court denied Unocal's motion for summary judgment.).

[225] Doe I v. Unocal Corp., 395 F.3d 932 (9th Cir. 2002), *vacating as moot,* 2005 WL 843914.

ery. State Superior Court Judge Victoria Gerard Chaney not only refused to dismiss the case, but she also refused Unocal's request to apply Burmese law on public policy grounds because Burmese law would not recognize the forced labor claim.

Even though the federal courts "would have diversity jurisdiction over those causes of action involving an alien and a U.S. citizen,"[226] ATCA-like actions might be an option in state courts. The Ninth Circuit acknowledged this possibility in *Hilao v. Estate of Ferdinand Marcos.*[227] Moreover, in *Yosofa Alomang v. Freeport-McMoran*,[228] a Federal District Judge in Texas remanded to state court a suit that alleged an American mining company's involvement in the perpetration of human rights abuses in Burma.[229] Thus, although the case involved the violation of international human rights treaties and foreign environmental damages, the case remained in state court by concentrating on the suit's state personal injury torts.[230]

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[226] STEPHENS & RATNER, *supra* note 159, at 36 (citation omitted). *See* Linder v. Portocarrero, 963 F.2d 332 (11th Cir. 1992); In re Estate of Marcos, Human Rights Litigation, 25 F.3d 1467 (9th Cir. 1994) (case of Jaime Piopongco).

[227] 25 F.3d 1467, 1476 n.10 (9th Cir. 1994).

> Though not raised by the parties, the plaintiffs may also state a cause of action for violations of municipal law. *See* Estate I, 978 F.2d at 503 (Trajano's claims against Marcos-Manotoc arose under wrongful death statutes as well as international law). *See generally* Tel-Oren, 726 F.2d at 782-88 (Edwards, J.) (substantive right could be derived from the domestic tort law of the United States if there is a nexus between the international tort providing jurisdiction and the domestic law tort providing the cause of action, and if limited to actions constituting universal crimes, domestic torts committed within the United States and injuring rights under international law, and torts committed by United States citizens abroad). We do not decide this issue.

Id.

[228] Alomang v. Freeport-McMoran Inc., 1996 WL 601431 (E.D. La. Oct. 17, 1996).

[229] *Id.*

[230] Alomang v. Freeport-McMoran Inc., 811 So. 2d 98 (La. Ct. App. 2002) (affirming the district court's dismissal of the action); *see also* Michael Swan, *International Human Rights Tort Claims and the Experience of United States Courts: An Introduction to the US Case Law, Key Statutes and Doctrines, in* TORTURE AS TORT 66-67 (Craig Scott ed., 2001).

3. IHRL Can Inform Judges' Decisions in Interpreting State Law

A human rights lawyer may persuade a state judge to look to IHRL as a tool in interpreting the state's constitution and statutes. The litigant does not need to argue that the human right law is binding on the court, but can use it as persuasive authority for the desired result. For example, although all fifty state constitutions provide a right to education,[231] international treaties and the jurisprudence of human rights institutions may provide the court with a fuller meaning of the right.[232] Subject matters often found in state laws that can benefit from the wider amplification supplied by international norms include health and medical care,[233] children,[234] welfare and social security,[235] discrimination against women,[236] homosexuals,[237] minorities,[238] the death penalty,[239] civil and political rights,[240] and

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[231] ALA. CONST. art. XIV, § 256; ALASKA CONST. art. VII, § 1; ARIZ. CONST. art. XI, § 1; ARK. CONST. art. XIV, § 1; CAL. CONST. art. IX, § 1; COLO. CONST. art. IX, § 2; CONN. CONST. art. VIII, § 1; DEL. CONST. art. X, § 1; FLA. CONST. art. IX, § 1; GA. CONST. art. VIII, § 1; HAW. CONST. art. X, § 1; IDAHO CONST. art. IX, § 1; ILL. CONST. art. X, §1; IND. CONST. art. VIII, § 1; IOWA CONST. art. IX, 2(D), § 3; KAN. CONST. art. VI; KY. CONST. art. 183; LA. CONST. art. VIII, § 1; ME. CONST. art. VIII, pt. 1, § 1; MD. CONST. art. VIII, § 1; MASS. CONST. pt. 2, ch. 5, § 2; MICH. CONST. art. VIII, § 2; MINN. CONST. art. XIII, § 1; MISS. CONST. art. VIII, § 201; MO. CONST. art. IX, § 1(A); MONT. CONST. art. X, § 1; NEB. CONST. art. VII, § 1; NEV. CONST. art. XI, § 2; N.H. CONST. pt. 2, art. LXXXIII; N.J. CONST. art. VIII, § 4; N.M. CONST. art. XII, § 1; N.Y. CONST. art. XI, § 1; N.C. CONST. art. IX, § 2; N.D. CONST. art. VIII, § 1; OHIO CONST. art. VI, § 3; OKLA. CONST. art. XIII, § 1; OR. CONST. art. VIII, § 3; PA. CONST. art. III, § 14; R.I. CONST. art. XII, § 1; S.C. CONST. art. XI, § 3; S.D. CONST. art. VIII, § 1; TENN. CONST. art. XI, § 12; TEX. CONST. art. VII, § 1; UTAH CONST. art. X, § 1; VT. CONST. ch. 2, § 68; VA. CONST. art. VIII, § 1; WASH. CONST. art. IX, § 1; W. VA. CONST. art. XII, § 1; WIS. CONST. art. X, § 3; WYO. CONST. art. VII, § 1.

[232] *See* ICESCR, *supra* note 36, at art. 13.

[233] *See id.* art. 12.

[234] *See generally* CAT, *supra* note 64; UDHR, *supra* note 34; U.N. Charter, *supra* note 53.

[235] *See* ICESCR, *supra* note 36, at arts. 9, 10(2), 11.

[236] *See* CEDAW, *supra* note 58; ICESCR, *supra* note 36, at art. 3; ICCPR, *supra* note 31, at art. 3.

[237] *See* Toonen v. Australia, Views of the Human Rights Comm., Commc'n No. 488/1992, U.N. Doc. CCPR/C/50/D/488/1992 (Mar. 31, 1994) (finding that arts. 2(1) and 17(1) of the ICCPR were violated by Australia's anti-gay law); Lawrence v. Texas, 539 U.S. 558 (2003) (citing a decision from the European Court of Human Rights in striking down Texas' anti-sodomy law under the Fourteenth Amendment).

economic and social rights such as the right to adequate food.[241] Moreover, using IHRL as an interpretive tool is practical even though it is not binding, because "[i]f a court uses human rights law to reach a decision in your favor, it doesn't matter very much what the legal status of the international norm is."[242] The following chart provides an example of how these rights can be used to help interpret affirmative rights embraced in various state constitutions.

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[238] *See* ICCPR, *supra* note 31, at art. 27 (providing that "[i]n those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right . to enjoy their own culture, to profess and practise their own religion, or to use their own language.").

[239] *See* Second Optional Protocol to the ICCPR, Art. 6, G.A. Res. 44/128 (Dec. 15, 1989) (referring "generally to abolition in terms which strongly suggest that abolition is desirable.").

[240] *See generally*, ICCPR, *supra* note 31; UDHR, *supra* note 34; U.N. Charter, *supra* note 53.

[241] *See generally* ICESCR, *supra* note 36, Comm. on Econ., Soc. & Cultural Rights, General Comment No. 12, UN Doc.E/C.12/1999/5 (1999) (stating that art. 11's provision for the right to adequate food, "like any other human right, imposes three types or levels of obligations on State parties: the obligations to *respect,* to *protect*, and to *fulfill*") (emphasis added).

[242] Hoffman, *supra* note 167, at 63.

TABLE 4

A SAMPLE OF POSITIVE RIGHTS FOUND IN STATE CONSTITUTIONS

Alabama	"The state . . . may acquire, build, establish, own, operate and maintain hospitals, health centers, sanatoria and other health facilities."[243]Requires the counties to make "adequate provision for the maintenance of the poor."[244]
California	Authorizes aid to abandoned children, aged persons in indigent circumstances, needy blind persons, needy physically handicapped persons, minor orphans, and children of a father who is incapacitated for work.[245]
Colorado	Promises to provide an old-age pension to all residents sixty years of age and older.[246]
Georgia	Authorizes the legislature to provide medical and other care for the indigent sick and to support paupers.[247]
Idaho	State has a duty to establish and support such charitable, educational, and penal institutions as the public good may require.[248]
Louisiana	Legislature may "establish a system of economic and social welfare, unemployment compensation, and public health."[249]
Massachusetts	Guarantee of food and shelter in times of emergency.[250]
Mississippi	Duty to provide for the treatment and care of the insane, an authorization to provide for the indigent sick in state hospitals and to provide homes for persons who may have claims upon society.[251]
Montana	Provides children with fundamental rights "unless specifically precluded by laws which enhance [their] protection."[252]State obligation to provide such economic assistance and social and rehabilitative services for those who, "by reason of age, infirmities, or misfortune are determined by the legislature to be in need."[253]
New York	Requirement that "the aid, care and support of the needy are public concerns and shall be provided by the state."[254]The legislature may provide housing for the poor.[255]
North Carolina	Caring for the poor is "one of the first duties of a civilized and a Christian state."[256]
Oklahoma	State must establish and support educational, reformatory and penal institutions and those with special needs, and others as the public good requires.[257]Legislation may be enacted to care for the elderly who are in need and cannot provide for themselves.[258]
Wyoming	Requires the state to establish and support such charitable institutions as the claims of humanity and the public good may require.[259]

243 ALA. CONST. amend. 53.
244 *Id.* at art. IV, § 88.
245 CAL. CONST. art. XVI, § 3.
246 COLO. CONST. art. XXIV.
247 GA. CONST. art. III, § IX, para. VI(i).
248 IDAHO CONST. art. X.
249 LA. CONST. art. XII, § 8.
250 MASS. CONST. art. XLVII.
251 MISS. CONST. art. IV, § 86; MISS. CONST. art. XIV, § 262.
252 MONT. CONST. art. II, § 15.
253 *Id.* at art. VII, § 3.
254 N.Y. CONST. art. XVII, § 1.
255 *Id.* at art. XVIII.
256 N.C. CONST. art. XI, § 4.
257 OKLA. CONST. art. XXI, § 1.
258 *Id.* at art. XXV, § 1.
259 WYO. CONST. art. VII, § 18.

4. State Courts May Use Customary International Law

Because a state court can utilize CIL, the litigant need not worry if the U.S. has not signed a particular treaty, or if a non-self-executing clause has been attached to a treaty the U.S. has ratified. A human rights lawyer may utilize CIL in three ways: (1) by arguing that CIL provides, as dictated by *The Paquete Habana*,[260] an independent body of law that binds U.S. courts; (2) by arguing that the CIL constitutes *jus cogens*;[261] or (3) by asking the court to use CIL as a tool to interpret U.S. law.[262]

Many important rights in the UDHR have evolved into CIL and are ripe for use by state courts in interpreting state laws. Generally speaking, the following *jus cogens* offenses constitute CIL: "(a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman and degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights."[263] Although states may use CIL, the opportunity to do so may not arrive for many years since many positive rights have not yet been considered CIL, and the cases that claim a violation of rights already recognized as CIL would most likely be suitable for an ATCA or TVPA suit. Moreover, the dilemma of how to deal with a conflict between CIL and a differing state law has proven to be a challenge for human rights litigators, who instead choose "to present international norms for their interpretive value rather than their preemptive force."[264] Therefore, CIL may carry as much force as international treaties.

5. Non-self-executing Treaties Can be Used to Interpret State Laws and as a Defense in State Courts

The non-self-executing declaration often attached by the Senate to human rights treaties does not signify that theses treaties lack legal impor-

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[260] 175 U.S. 677, 700 (1900) (holding that "[i]nternational law is part of our law [and that] where there is no treaty and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations.").

[261] *Jus cogens* are fundamental principles of international law that allow no derogation.

[262] Sandra L. Babcock, *International Law in Capital Cases (Last Updated August 2003)*, *available at* http://www.aclu.org/hrc/DP_Babcock.pdf.

[263] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 702 (1987).

[264] Joan Fitzpatrick, *The Preemptive and Interpretive Force of International Human Rights Law in State Courts*, 90 AM. SOC'Y INT'L L. PROC. 262, 265 (1996).

tance in state courts. These declarations are simply the Senate's way of saying that human rights treaties do not create a private cause of action in U.S. courts until Congress legislatively implements those rights into U.S. law. Consequently, "[t]his leaves unaffected such possibilities as reference to treaty norms in interpreting state law [and] reliance on treaty provisions as a defense in state litigation."[265] It can be cogently argued that a private cause of action, which is prohibited when a treaty is non-self-executing, is not synonymous with a defense, and is permitted under the treaty.[266] Moreover, state courts can follow the lead of some federal courts in accepting non-self-executing treaties when used for the purposes of defense.[267]

B. Normative Arguments

1. Substantive Importance of Policy Making in U.S. State Courts

State courts are often overlooked despite the important role they play in the creation of substantive policies that affect American citizens on an individual and local level. Because of this unique feature of state courts, human rights attorneys should press state courts to use IHRL. Furthermore, state courts should accept these arguments because the norms and jurisprudence found in IHRL provide a legal framework that can help judges interpret the positive rights included in their own constitutions. In the U.S., the bulk of the judicial workload – over 99 percent – occurs at the state rather than federal level, with 95 percent of U.S. judges working at the state level.[268] Moreover, it is not just the sheer size of the state judicial system that is significant; it is also the fact "that the decisions of state jurists frequently have a great impact on public policy."[269] State courts utilizing

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[265] *Id.* at 264.

[266] Christian A. Levesque, *The International Covenant on Civil and Political Rights: A Primer for Raising a Defense Against the Juvenile Death Penalty in Federal Courts,* 50 AM. U. L. REV. 755, 776 (2001).

[267] *See* Part III(B), *supra* text and accompanying notes.

[268] ROBERT A. CARP & RONALD STIDHAM, JUDICIAL PROCESS IN AMERICA 84 (2001) [hereinafter CARP & STIDHAM], *citing* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 37 (1996).

[269] For example, during the 1970s a number of suits were brought into federal court challenging the constitutionality of a state's spending vastly unequal sums on the education of its schoolchildren . . . The litigants claimed that children in the poorer districts were victims of unlawful discrimination in violation of their equal protection rights under the U.S. Constitution. The Supreme Court said they were not, however, in a conservative-dominated five-to-four decision. [San Antonio Independent School District

IHRL will also set the foundation for using human rights law in federal courts.

Because state court judges have less of a public audience, they might be more apt to apply IHRL than the Supreme Court Justices. The rediscovery of state courts has been "encouraged by social reform groups that began to look to state courts as a new arena in which to pursue their goals as the U.S. Supreme Court became increasingly unsympathetic to their agenda."[270] According to Professor Anthony Tarr, litigants have been instrumental in causing state judges to explore their state constitutions in ways that they would not have done on their own initiative.[271] One Judge-Participant at the 1992 Forum for State Judges remarked that:

> On our court, we see our role as writing and interpreting for a different constituency from the United States Supreme Court. The Supreme Court writes for a very broad constituency and deals with problems that have probably the lowest common denominator. We think that in our small state we can perhaps have a little more play in the joints, give a smidgeon more freedom here and there, because we're not writing for the national scene.[272]

In addition, because the freedoms found in state law often surpass those found in federal law, state courts can expand upon them using IHRL as an interpretive aid in ways that the federal courts cannot. IHRL litigation has found a new forum in state courts, where substantive state constitutional

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> v. Rodriguez, 411 U.S. 1 (1973)]. But the matter did not end there. Litigation was then instituted in many states arguing that unequal educational opportunities were in violation of various clauses in state constitutions. During the past two and a half decades such suits have been brought twenty-eight times in some twenty-four states. In fourteen of these cases state supreme courts invalidated their state's method of financing education, involving the reallocation of billions of dollars. In some instances these decisions altered the entire structure of the state educational system.

Id. at 85 (citation omitted).

[270] AMERICAN BAR ASSOC., JUSTICE IN JEOPARDY: REPORT OF THE COMMISSION ON THE 21ST CENTURY JUDICIARY 15 (2003) [hereinafter JUSTICE IN JEOPARDY]. *See also* William Brennan, *State Constitutions and the Protection of Individual Rights,* 90 HARV. L. REV. 489 (1977).

[271] JUSTICE IN JEOPARDY, *supra* note 270, at 15.

[272] ROSCOE POUND FOUNDATION & YALE LAW SCHOOL, PROTECTING INDIVIDUAL RIGHTS: THE ROLE OF STATE CONSTITUTIONALISM 63 (1993).

rights are litigated with increasing frequency using international norms as interpretive aids.

2. IHRL Comports with Justifications for Local Justice

The idea of local justice was so important to the drafters of the Rome Statute of the ICC that the idea of complementarity was written into it for this very reason.[273] Seeing that IHRL embodies universal values and norms that are shared by all, local courts have the first chance to do the right thing and enforce these standards. If the local court fails or refuses to do so, then it is the job of the federal courts (or an international court) to do it for them.

States are, in fact, making a comeback. The revival of state constitutionalism in recent decades "was stimulated by concerns similar to those animating human rights activists – a sense that the federal Constitution does not fully guarantee basic human dignity, especially in the realm of economic and social rights."[274] It is in these areas of social welfare where state laws surpass federal law, meaning that state courts are more accessible to claims concerning the needs of their citizens.[275] As Justice Doggett of the Texas Supreme Court explained, "this is not just the rebellion of the country bumpkins or the provinces against the center. Rather, it is fundamentally the notion that the states can be a source of new ideas."[276] State courts that have more generous constitutions to work with than do the federal courts do indeed have much to offer their citizens in terms of implementing their international human rights.

By using state courts to empower themselves with the tools of IHRL, a sense of local ownership can be created. In the same sense, state

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[273] The Preamble to the Rome Statute states that the ICC "shall be complementary to national criminal jurisdictions . . . ." Rome Statute, *supra* note 12, at Preamble.

[274] Fitzpatrick, *supra* note 264, at 265.

[275] *See* Part IV, *supra* text.

[276] Justice Lloyd Doggett, *Response to Professor Amar*, *in* PROTECTING INDIVIDUAL RIGHTS: THE ROLE OF STATE CONSTITUTIONALISM 49, 53 (1993):

> We talk about a floor under the federal Bill of Rights and a ceiling provided by the states. With that federal floor in apparent free fall, the place where the exciting legal questions of our day will be resolved is in our state courts. I think we can take a great deal of pride as state judges that in our courthouses across the country we will have an opportunity to deal with the tough issues of the next century. In the process, we can contribute to the national jurisprudence, and hopefully to a future reawakening to individual liberties here in our nation's capital.

courts are more flexible and able to evolve than federal courts. The rules that are made in state courts are uniquely local and apply to the people who live in that state.

3. Local Governments Have Already Begun to Implement IHRL

States and cities have already begun looking to IHRL to help their communities, going so far as passing international treaties as local laws. Implementing IHRL at the local level has become a creative strategy that allows human rights activists to "bypass federal resistance to international human rights standards, and instead focuses on putting these standards to work right in our own communities by making local governments accountable to them."[277] Of course, neither states nor cities may sign international instruments, but considering the lack of will at the federal level to do so, local governments may choose implementation of IHRL as a more effective way to pull the U.S. into compliance with international human rights standards. Litigants may use the following examples of local implementation to guide state judges.

In 1998, the city of San Francisco was the first city or state in the country to implement CEDAW as a local ordinance. Because of the lack of federal action to do so, Mayor Willie L. Brown Jr. signed into law an ordinance that "implements the principles underlying the [CEDAW]."[278] The city acknowledged that the San Francisco CEDAW provision "represents the growth of an indigenous human rights movement in the United States."[279] For example, New York City is in the process of adopting CEDAW as a local law. Launched in 2002, the New York City Human Rights Initiative was "[i]nspired by the San Francisco success"[280] but goes even further by combining the principles of CEDAW with CERD, the convention against racial discrimination.[281] The local laws are being advocated as providing the city with "specific guidelines and tools that incorporate

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[277] AMNESTY INTERNATIONAL, WOMEN'S HUMAN RIGHTS: MAKING HUMAN RIGHTS MEANINGFUL IN OUR COMMUNITIES, par. 4, *available at* http://www.amnestyusa.org/women/interact/cerd_cedaw.html [hereinafter AMNESTY INTERNATIONAL].

[278] Press Release, The City and County of San Francisco, Department on the Status of Women, San Francisco Releases the First U.S. City Human Rights Report on Women (Nov. 5, 1999), *available at* http://www.sfgov.org/site/dosw_page.asp?id=19793.

[279] *Id.*, *quoting* Krishanti Dharmaraj, Executive Director of the Women's Institute for Leadership Development for Human Rights.

[280] AMNESTY INTERNATIONAL, *supra* note 277.

[281] *Id.* par. 6.

human rights principles, create preventive measures, enable more effective public participation and, ultimately, improve the quality of life for all New Yorkers."[282] These two examples help illustrate how local governments have begun to accept their role in the implementation of international human rights, and how human rights truly begins close to home.

But one cautionary tale comes from Massachusetts. In 1996, a few months before federal sanctions were imposed against Burma for their human rights abuses, the Massachusetts legislature adopted the Massachusetts Burma Law which restricted the ability of Massachusetts agencies to do business with Burma. Because of the Congressional action, though, the Supreme Court, in *Crosby v. National Foreign Trade Council*, declared the state law unconstitutional under the Supremacy Clause, "owing to its threat of frustrating statutory objectives."[283] However, many other states and cities have passed similar "selective purchasing laws" and so long as they do not encroach on the federal foreign affairs powers, they will be upheld as constitutional.[284]

4. Immunity from Supreme Court Review

The Supreme Court cannot review a state court decision that was decided on independent and adequate state grounds. The decision must have been "independent from federal grounds and adequate to support the state court decision,"[285] but a federal court may review a case if "the state has failed to protect rights granted by the federal constitution."[286] Moreover, if a Supreme Court reversal of the federal law basis of the decision will not change the result in the case, the Supreme Court cannot hear the case.[287] Therefore, a state decision that used international human rights law to guide its interpretation of the state constitution will be immune from Supreme Court review, signifying the considerable latitude state judges have in using IHRL to support their decisions.

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[282] *Id.* par. 9.

[283] 530 U.S. 363, 366 (2000).

[284] *See* EARTHRIGHTS INTERNATIONAL, USA LEAD: SELECTIVE PURCHASING LAWS, *available at* http://www.earthrights.org/usalead/spl.shtml.

[285] Penny J. White, *Legal, Political, and Ethical Hurdles to Applying International Human Rights Law in the State Courts of the United States (And Arguments for Scaling Them)*, 71 U. CIN. L. REV. 937, 944 (2003).

[286] *Id.*

[287] *See* Williams v. Kaiser, 323 U.S. 471 (1945); Michigan v. Long, 463 U.S. 1032 (1983).

C. Objections to State Courts Using IHRL

1. The Effects of Federalism on Human Rights

There is much concern over federalism decisions by the Supreme Court. Some argue that these decisions do not enhance liberty, as the advocates suggest, but that they instead have the opposite effect. The scholarly work on the subject is often inconclusive:

> There are . . . huge literatures on how – depending on one's take – federalism either improves government or impedes progress, enhances freedom or permits racism, fosters participatory democracy or entrenches local elites, facilitates regulatory diversity or creates races to the bottom, protects individual liberty or encourages tyranny, promotes responsible fiscal policy or generates inexorable pressures to expand government, and on and on.[288]

Ultimately, individual rights depend not on recent federalism decisions, but on how states exercise their delegated authority vis-à-vis decisions that have decreased Congress' regulatory power. Human rights attorneys must, therefore, remain diligent advocates for the application of IHRL in state courts.

The argument against federalism rests on a few main points. Legal scholars Edward Rubin and Malcolm Feeley assert that federalism "does not secure citizen participation, does not make government more responsive or efficient by creating competition, and does not encourage experimentation."[289] Moreover, Erwin Chemerinsky believes that "over time, there is no reason to believe that federalism decisions will do more to advance than restrict liberty."[290] Even assuming this is true, there is an urgent need to litigate at the state level to counter the restrictions of liberty that may be caused by a reemergence of states' rights decisions.

An assumption that is often made is that states encourage local participation because they are fundamentally closer to the people. Rubin and Feeley, however, state that this "is one of the many unproven assumptions

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[288] Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994).

[289] Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 909 (1994); *see also* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105 (1977) (arguing that federal courts are more likely than state courts to effectively enforce negative rights).

[290] Erwin Chemerinsky, *Have the Rehnquist Court's Federalism Decisions Increased Liberty?*, HUM. RTS. MAG. (Fall 2002), *available at* http://www.abanet.org/irr/hr/fall02/liberty.html.

that fester in this field without either theoretical or empirical support."[291] They provide empirical proof that "support for urban planning generally, or for specific city functions such as schools or police, has often come from the federal government, not from the states."[292] They also urge that "federalism should not be imposed as a constraint on national policy."[293] In this vein, federalism serves as a poor excuse when local justice does not do the right thing.

In addition, local governments have often been worse for minorities than a centralized or federal government. Federal governments are likely to provide more protections for "minority subgroups that otherwise face intolerance by local authorities."[294] The danger of small communities making substantive rules, rather than having a national uniform policy, is their potential to make decisions that are xenophobic. On the other hand, communities may also try to enhance tolerance and the respect for human rights.[295] Recommending that human rights advocates litigate IHRL at the state level, however, does not require a dismissal of these arguments. Utilizing a "bottom-up" approach to implement human rights is not mutually exclusive from pressing the federal government, in a "top-down" approach, to comply with IHRL as well.

Federalists often resist the use of international law in American courts, considering it to be an invasion of foreign principles. The fact that international law "evolves on the basis of the views of entities, such as domestic and foreign jurists, foreign and transnational courts and treaty making bodies,"[296] concerns one federalist, who posits that these bodies are "'neither representative of the American political community nor responsive to it.'"[297] However, persuading states to implement IHRL on their own, and not through foreign compulsion or federal regulation of local activity, alleviates this fear.

The goals of federalism comport with advocating the use of state courts, as opposed to federal courts, in deciding cases that implicate IHRL

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[291] Rubin & Feeley, *supra* note 289, at 916.

[292] *Id.*

[293] *Id.* at 951.

[294] Martha Minow, *Putting Up and Putting Down: Tolerance Reconsidered, in* COMPARATIVE CONSTITUTIONAL FEDERALISM, EUROPE AND AMERICA 78 (Mark Tushnet ed., 1990).

[295] *See, e.g.* Rubin & Feeley, *supra* note 289, at 940-41.

[296] Christian G. Vergonis, *The Federalism Implications of International Human Rights Law*, FED. SOC. L. & PUB. POL'Y STUD. 12, *available at* http://www.fed-soc.org/Intllaw&%20AmerSov/Int%271%20(final)%20vergonis.pdf (citation omitted).

[297] *Id.*

in local communities. Federalism is a system of government that distributes power between national and state governments. The U.S. Constitution established our federalist system by giving Congress certain enumerated powers, such as Article I, § 8,[298] and by giving the rest of the powers not delegated to the federal government to the states.[299] Decisions by the Supreme Court "signal a halt in the Court's willingness to uphold federal regulation claimed to intrude on state government competencies."[300] This provides an impetus for states to reclaim their constitutional power.

Our federalist system created the capacity for each state to take care of its own citizens, never intending the federal government to take over these obligations. The Constitution left "the 'police power' – the protection of public health, safety, and morals – . . . to the states, with the federal government entrusted with less sensitive powers like those over interstate and foreign commerce."[301] While the federal government has in fact enacted many social welfare programs, it is under no legal obligation to do so, and is "*legally* free to shift these responsibilities back to the states."[302] The combination of the intent of the federalist system which left social rights to be protected by the states, and the current uncertainty in the continuance of federal welfare programs, explains why state constitutions often include social rights; thus, litigating IHRL at the state level can result in substantial rewards.

One must fully understand the goals of a federalist constitution in order to appreciate the link between IHRL and state courts. The Founding Fathers designed this system with three complementary objectives in mind: "(1) '[t]o secure the public good'; (2) to protect 'private rights'; and (3) 'to

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[298] U.S. CONST. art. I, § 8.

[299] The Tenth Amendment to the U.S. Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X.

[300] VICKI C. JACKSON & MARK TUSHNET, COMPARATIVE CONSTITUTIONAL LAW 792 (1999). *See* New York v. United States, 505 U.S. 144 (1992); United States v. Lopez, 514 U.S. 549 (1995); Printz v. United States, 521 U.S. 98 (1997); City of Boerne v. Flores, 521 U.S. 507 (1997); United States v. Morrison, 529 U.S. 598 (2000).

[301] Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1506 (1987).

[302] Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an "Entirely New Strategy,"* 44 HASTINGS L.J. 79, 94-96 (1992).

preserve the spirit and form of popular government.' "[303] But why did they believe that these objectives would be met by giving states more power? First, they believed that federalism "assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society."[304] Second, federalism increases the opportunities for citizen involvement in the democratic processes, making the local governments "more responsive by putting the States in competition for a mobile citizenry."[305] Local governments also help foster citizen political participation by "providing alternative and perhaps more accessible fora for political participation than does the federal government."[306] Third, federalism "allows for more innovation and experimentation in government."[307] Litigating IHRL in a conservative state court might, therefore, be bolstered by raising these federalism justifications to the court.

Even though our system provides that the federal Constitution serves as a floor for rights, this has less to do with federalism than it does with not trusting majoritarian rule. Certain fundamental issues relating to rights and justice are subject to a national rule that binds both levels of government.[308] An intergovernmental system serves as a check on state governments if fundamental rights are violated. A prime example is the Rodney King incident where, despite evidence to the contrary, a jury in California state court acquitted the policemen of the March 1991 beating. A retrial in federal court resulted in the conviction of two of the four Los Angeles Police Department officers for violating King's federal civil rights.[309]

Federalism also gives states more power to respond to needs that are neglected by the federal government, including protecting themselves from federal violations of human rights. The federal government's blatant refusal to incorporate IHRL into domestic law does not prevent the state from providing these norms to its own citizens. Another rationale for feder-

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[303] McConnell, *supra* note 301, at 1492, *citing* Federalist 10 (Madison), *in* THE FEDERALIST PAPERS 80 (1961).

[304] Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

[305] *Id.*

[306] Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?*, 95 COLUM. L. REV. 1001, 1077 (1995).

[307] Gregory, 501 U.S. at 458 (1991).

[308] McConnell, *supra* note 301, at 1506-07.

[309] United States v. Koon, 833 F.Supp. 769 (C.D. Cal. 1993), *aff'd in part, vacated in part,* 34 F.3d 1416 (9th Cir. 1994), *aff'd in part, rev'd in part, and remanded,* 518 U.S. 81 (1996).

alism was the Founding Fathers' belief of "the role of the states as a bulwark against possible federal tyranny,"[310] where "state governments can compete with the federal government in providing public goods and social services."[311] Along these lines, states and cities, concerned that the federal government is not properly providing for its citizens, have recently begun to increase the minimum wage in their locality from the federal minimum wage of $5.15 an hour. For example, in February 2003, Santa Fe, New Mexico passed a "living wage" ordinance that "set the wage floor at $8.50 an hour, which would increase to $9.50 in January 2006 and $10.50 in 2008."[312] Santa Fe City Councilor Carol Robertson Lopez stated that "the living wage is an indicator of when we've given up on the federal government to solve our problems. So local people have to take it on their own."[313] Santa Fe's power to mandate a minimum wage higher than the current state and federal minimum hourly wage was upheld by the court of appeals in *New Mexicans for Free Enterprise v. City of Santa Fe.*[314]

Although the appellate court's decision did not mention IHRL, *New Mexicans for Free Enterprise* provided perfect fodder for arguments for state courts to accept the relevance of IHRL provisions such as ICESCR Article 7 recognizing the right to fair wages and a decedent living. Proponents of a living wage hope that raising minimum wages in cities and states will pressure the federal government to take action. This strategy is not new. Harvard Professor Richard Freeman explains that "a lot of the New Deal legislation, good or bad, came about because there was a lot of state legislation,"[315] and that the "things that work the best might be adopted nationally."[316] Under this rubric, state courts upholding IHRL might pressure the federal government to ratify and implement international human rights treaties.

Liberals have historically been opposed to federalism, but federalism might in fact be the lynchpin in securing human rights in the U.S. If

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[310] John O. McGinnis & Ilya Somin, *Federalism vs. States' Rights: A Defense of Judicial Review in a Federal System,* 99 Nw. U. L. Rev. 89, 110 (2004).

[311] *Id.* at 111. Some federal congressmen argue that the issues addressed by international human rights treaties "are within the exclusive authority of the states, and that national adoption would infringe on state sovereignty." Stark, *supra* note 302, at 82.

[312] Jon Gertner, *What Is a Living Wage?*, N.Y. Times (Magazine), Jan. 15, 2006 at § 6, 38.

[313] *Id.*

[314] N.M.C.A. No. 25,073 (Nov. 29, 2005).

[315] Gertner, *supra* note 312.

[316] *Id.*

the federal government refuses to implement IHRL into domestic law, as has been and continues to be the case, then the only alternative is utilizing the states to bring human rights home. In fact, some liberal judges in the Ninth Circuit have caught on and have "used federalism precedents to partially invalidate federal laws against possession of pornography and medical use of marijuana, and a leading conservative judge used these precedents to invalidate a federal gun control law."[317] These decisions illustrate the growing trend of using federalism to protect civil rights and liberties. Scholars have advocated expanding the federalism doctrine into areas where support is stronger at the state level.[318]

Perhaps, however, it need not be a sincerely held belief in the virtues of federalism, and could be more of an opportunistic strategy whose ends justify the means. For instance, some conservatives tout federalism only when they like the outcome. The flurry of political steam surrounding the removal of Terry Schiavo's feeding tube is a perfect example. In March 2005, Congress passed a bill subsequently signed into law by President Bush allowing federal courts to take over Shiavo's case from the Florida state courts. One of the few Republicans who voted against the bill admitted that his "party is demonstrating that they are for states' rights unless they don't like what states are doing,"[319] adding that "[t]his couldn't be a more classic case of a state responsibility."[320] It is not difficult, however, for a liberal to develop a genuine respect for states' rights; doing so will decrease public perceptions of political maneuvering as was the case with the Republicans in the Schiavo incident.

2. Lawyers Will Use IHRL Only if it is Effective

Persuading a state court to accept the reasoning of IHRL has no guarantees. Lawyers undoubtedly will not waste their time on an approach that has not been effective in the past. However, a first step is always necessary and human rights attorneys must help initiate the process of informing judges of international law by citing and analyzing the applicable

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[317] McGinnis & Somin, *supra* note 310, at 129, *citing* United States v. McCoy, 323 F.3d 1114 (9th Cir. 2003) (pornography); Raich v. Ashcroft, 352 F.3d 1222 (9th Cir. 2003) (marijuana); United States v. Stewart, 348 F.3d 1132 (9th Cir. 2003) (machine guns).

[318] *See, e.g.*, Stephen Clark, *Progressive Federalism? A Gay Liberationist Perspective*, 66 ALB. L. REV. 719 (2003) (arguing that enforcing federalism advances gay rights).

[319] Rep. Christopher Shays of Connecticut, *quoted in* Adam Nagourney, *G.O.P. Right Is Splintered On Schiavo Intervention*, N.Y. TIMES, Mar. 23, 2005, at A14.

[320] *Id.*

materials in their briefs and oral arguments.[321] Referring to this dilemma, one Supreme Court Justice stated that:

> There is a chicken-and-egg problem. The lawyers will [argue IHRL] only if they believe the courts are receptive. By now, however, it should be clear that the chicken has broken out of the egg. The demand is there. To supply that demand, the law professors, who teach the law students, who will become the lawyers, who will brief the courts, must themselves help to break down barriers.[322]

Eventually, more state judges will become well-versed in IHRL. Until that day, lawyers should find some solace in the few precedents that can be found in state courts and strive to add to that list. When traditional methods of litigating rights do not work, the strategy of using IHRL provides an alternative method.

3. State Judges Lack a Sufficient Understanding of IHRL

Willful ignorance is not a valid criminal defense; likewise, the willful ignorance of many judges (and Americans in general)[323] is not a proper objection to litigating IHRL in state courts. Unfortunately, this sort of ignorance has harmful consequences for those who litigate human rights. For example, many non-citizen criminal defendants challenge the constitutionality of their conviction due to the denial of their right to speak with their consulate, as provided for in the VCCR.[324] In 1997, the Mexican government had one of its nationals on death row in Texas claiming that Texas violated the VCCR. Alberto Gonzalez, who at that time was the legal coun-

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[321] The author of this article had trouble convincing opposing counsel of the merits of IHRL. After citing the CRC in a motion to reconsider the judgment to commit a juvenile delinquent to state custody, the Assistant District Attorney responded in her motion that "[i]nternational law is irrelevant and not even persuasive in this matter," adding that the defense counsel "fails to differentiate ideals from reality." Subsequently, the judge denied the motion without explanation. *State v. Amber S.*, JR-2002-109 (3d Jud. Dist., N.M.).

[322] Justice Stephen Breyer, *Keynote Address*,97 AM. SOC. INT'L L. PROC. 265, 267 (2003).

[323] According to a 1997 poll commissioned by the National Center for Human Rights Education, "92 percent of Americans had never heard of the Universal Declaration of Human Rights . . . 'Most people we meet still think of human rights as letter-writing campaigns to help free political prisoners.'" FORD FOUNDATION, *supra* note 30, at 47, *quoting* Loretta Ross.

[324] VCCR, *supra* note 20, at art. 36.

sel to Governor Bush, proved his ignorance of international (and constitutional) law by writing that "[s]ince the State of Texas is not a signatory to the [VCCR], we believe it is inappropriate to ask Texas to determine whether a breach . . . occurred in connection with the arrest and conviction."[325] Two days later, Texas executed the defendant. That some state judges are passionate about human rights and *will* make reference to IHRL in their decisions, speaks to the fact that not all state judges are uninformed of IHRL. Even if a judge is unfamiliar with IHRL, a litigant must, as in all other cases, educate the court of areas of the law that are in the best interest of the client.

4. State Judges are Political and Will Not Jeopardize Their Potential for Re-election

States select their judges through elections, appointments, or a combination of both. Even if a judge is initially appointed, the fact remains that "forty-one states require at least some of their judges to stand for election to remain in [office]."[326] In contrast to federal judges who are appointed for life, state judges face periodic elections that are oftentimes harshly political. It is not uncommon to hear of elections where a city has "punished" a judge for unpopular decisions. For example, after its Supreme Court retention election, Tennessee Governor Don Sundquist admitted to this trend by stating, "[s]hould a judge look over his shoulder [when making decisions] about whether they're going to be thrown out of office? I hope so."[327] Our judicial system was designed, however, to allow judges to protect individual rights at the expense of majoritarian disapproval.

Judges are often chided for a predictable range of issues. Most of the challenges are centered on opinions covering "school funding, abortion and parental consent, application of the death penalty, and tort reform."[328] One former state judge believes it is "unrealistic"[329] in the present atmosphere to "expect a state court judge, subject to retention or reelection, to initiate the application of [IHRL] in a state court, in the absence of higher state court or federal court precedent or a directive from another branch of

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[325] Mauro, *supra* note 185.

[326] Emily Field Van Tassel, *Challenges to Constitutional Decisions of State Courts and Institutional Pressures on State Judiciaries*, *in* JUSTICE IN JEOPARDY, *supra* note 270, Appendix E, at 3 (2003).

[327] JUSTICE IN JEOPARDY, *supra* note 270, at 18, *citing* Stephen Bright, *Political Attacks on the Judiciary*, 80 JUDICATURE 165, 166 (1997).

[328] Van Tassel, *supra* note 326, at 4.

[329] White, *supra* note 285, at 961.

government."[330] She explains that when faced with an IHRL claim, most state judges avoid the issue "either by asserting a procedural bar, a binding Senate reservation, or a federalism rationale."[331] Yet this is not a problem unique to state judges – federal judges also avoid applying IHRL. This should not prevent lawyers from endeavoring to alter this trend.

5. IHRL is Perceived as Un-American

Relating to the point that many state judges are not well-educated in international law is the argument that IHRL interferes with the democratic law making process. For some, international human rights treaties may "constitute 'imported' values that are somehow delegitimized because they did not follow the traditional law making process."[332] State politicians often communicate this belief as a barrier between U.S. and international institutions that oversee international human rights compliance. For example, in *U.S. v. Breard*,[333] a Paraguayan citizen was tried and convicted of murder in the Virginia state courts and sentenced to death. While the case was being appealed to the ICJ on claims of a violation of the VCCR, the ICJ "indicated as a matter of urgency provisional measures that the United States should take to avoid the execution scheduled for that week."[334] Accordingly, the U.S. Secretary of State asked the Governor of Virginia to stay Breard's execution for foreign policy reasons. Despite this request, the Governor said:

> I am concerned that to delay Mr. Breard's execution so that the International Court of Justice may review this matter would have the practical effect of transferring responsibility from the courts of the Commonwealth and the United States to the International Court . . . .
> The U.S. Department of Justice, together with Virginia's Attorney General, make a compelling case that the International Court of Justice has no authority to interfere with our criminal justice system. Indeed, the safety of those residing in the Commonwealth of Virginia is not the responsibility of the International Court of Justice. It is my responsibility

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330 *Id.*

331 *Id.*

332 Todd Howland, *Rael v. Taylor and the Colorado Constitution: How Human Rights Law Ensures Constitutional Protection in the Private Sphere*, 26 DENV. J. INT'L L. & POL'Y 1, 25 (1997), *citing* U.S. CONST. art. 1, § 7.

333 Breard v. Greene, 523 U.S. 371 (1998).

334 STEINER & ALSTON, *supra* note 38, at 745.

> and the responsibility of law enforcement and judicial officials throughout the Commonwealth. I cannot cede such responsibility to the International Court of Justice. . . .
>
> . . . I find no reason to interfere with his sentence.[335]

Not surprisingly, Breard was executed. This reflects a common belief among Americans that the U.S. may criticize other countries for their human rights abuses but should not allow the international community to critique how the U.S. treats its own nationals.

Enforcing the rights often found in IHRL may also be viewed as over-stepping the boundaries of the judiciary. There are assumptions that positive rights – those that "invite and demand government"[336] – are un-American, are costly, and are incapable of being judicially enforced. These are false assumptions. First, many states already have positive rights in their constitutions.[337] Second, all rights necessitate a remedy and thus even negative rights – those that ban and exclude government action – are not cost-free.[338] Lastly, state judges may constitutionally enforce positive rights embedded in state constitutions. Therefore, the positive rights found in IHRL and the jurisprudence surrounding them can be utilized to give meaning to the positive rights included in state constitutions.

It is accurate, however, to say that the federal government was intended to protect negative rights. The Constitution created a federal government with no general police powers and a Bill of Rights that was purely negative; "[i]t marked off a world of the spirit in which government should have no jurisdiction; it raised procedural barriers to unwarranted intrusion."[339] Yet this is so only in relation to the federal government; states were intended to provide for the greater good of their populations. This explains why state constitutions have historically "focused not only on the political structure of government, but also on the provision of public goods, the promotion of community values, and the regulation of state and local

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[335] Id.

[336] STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 40 (1999).

[337] *See* TABLE 4: A SAMPLE OF POSITIVE RIGHTS FOUND IN STATE CONSTITUTIONS, *supra* text Part V(A)(3).

[338] *Id.*

[339] Archibald Cox, *The Supreme Court, 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 93 (1966-67).

finance."[340] An abundance of social and economic rights are found in state constitutions.[341]

Enforcing both negative and positive rights implicates budgetary matters. This should not stop courts from seriously considering applying positive rights found in IHRL. For example, even the most negative rights, like the "right to free speech and private property, require governmental action"[342] because "[p]rivate property cannot exist without a governmental apparatus, ready and able to secure people's holdings as such"[343] and because they "need significant taxpayer support."[344] Enforcing positive rights that require governmental expenditures, therefore, is not any different than a judge requiring extra police to protect the Nazis marching through Skokie. Although "[i]t seems simpler for a court to order the government to stop interfering with speech than for a court to determine how much funding is needed for secondary education,"[345] courts throughout the world have done just that.

VI. CONCLUSION

In the practical sense, human rights advocates should focus on all levels of government – international, regional, and domestic – in order to have a greater impact on human rights.[346] Yet because international and regional institutions have proven inadequate to deal with American legal issues, lawyers are left with domestic litigation. Furthermore, using state courts to implement international human rights is an avenue replete with possibilities that do not exist at the federal level. Federal courts, both legally and politically, fail to provide an adequate forum for litigating IHRL. Specifically, the legal trend in federal courts is to refrain from enforcing human rights treaties that contain non-self-executing clauses.

Although these treaties can be used as a defense and as an interpretive tool in both state and federal courts, the more substantive laws that can be interpreted using IHRL exist in state constitutions and statutes. In addition, relying on IHRL to interpret a state constitution insulates the decision

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[340] Hershkoff, *supra* note 7, at 812-13 (citations omitted).

[341] *See supra* text Part V(A)(3).

[342] CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 222 (2001).

[343] *Id.* at 222-23.

[344] *Id.* at 223.

[345] Kende, *supra* note 2, at 155.

[346] *See, e.g.*, HUMAN RIGHTS INTERNET, DOMESTIC IMPLEMENTATION OF INTERNATIONAL HUMAN RIGHTS: LITIGATING ECONOMIC, SOCIAL AND CULTURAL RIGHTS, *available at* www.hri.ca/fortherecordCanada/vol1/guide-part_11.htm.

from Supreme Court review. As opposed to the limited reach of the four federal human rights statutes, state courts have more legal routes for implementing IHRL. State courts can find that human rights abuses occurring in the state or abuses that occur outside the state by a state citizen or corporation violate the state constitution. Moreover, our Founding Fathers' rationales for federalism indicate a preference for state courts to respond to the local needs of their citizens, giving states the opportunity to implement IHRL in ways that affect the day-to-day lives of Americans.

This solution can garner support from both sides of the international debate. Those on the left will support the fact that IHRL is finally being implemented in the U.S. and those on the right will support the fact that an international body is not judging America; rather, a state judges its own state's compliance with international norms. Of course, the initial hurdle is to overcome the "prevailing arrogant view that all things American are good and just"[347] and accept the truth that "[s]tate courts are transnational actors, too."[348] International human rights law was designed to pressure nations to honor and respect human rights through their domestic laws so that everyday life would be an embodiment of these norms.[349] State courts tend to have more of an impact on the lives of ordinary citizens and are therefore the most appropriate starting point in achieving this goal. Not only will state courts be able to add to the IHRL jurisprudence, but they will also help bring the U.S. into compliance with international human rights standards.

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[347] Law Professor Speedy Rice, *quoted in* FORD FOUNDATION, *supra* note 30, at 25.

[348] Tulsa Law Professor Janet Levit, *quoted in* Mauro, *supra* note 185 (regarding the Oklahoma Court of Criminal Appeals' ruling that enforced the ICJ's ruling in the Osbaldo Torres case).

[349] *See* Louis Henkin, *International Human Rights and Rights in the United States*, *in* 1 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 25 (Theodor Meron ed., 1984).